Controlled Lending by Public Libraries Under Indian Law

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WORKING PAPER

Last Revised: May 7, 2023

Abstract

Libraries have, since antiquity, engaged in the practice of controlled lending. Libraries decide whom to serve, whether books circulate or not (and under what terms), how they interact with other public libraries, and other aspects of their operations. This paper provides a comprehensive update based on a survey of the copyright law, laws governing operation of libraries, as well as the constitutional underpinnings in Indian law, and in international law and practice. The paper has a focus on public and publicly-supported libraries, particularly libraries in public academic institutions such as law schools.

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The authors wish to thank Professor Aishwarya Chaturvedi, Assistant Professor, Jindal Global Law School and Public Resource Fellow (2022) for her very substantial assistance in the research and background materials used in this paper.

Location: https://archive.org/details/Controlled.Lending.India

Publisher: Public.Resource.Org, Inc. (“Public Resource”)

Citation: Lawrence Liang and Carl Malamud, *Controlled Lending by Public Libraries Under Indian Law*, Working Paper, ISBN: 978-1-892628-19-0, Public Resource (Last revised May 4, 2023).

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1. Introduction

On the 21st of September 1933, Mahatma Gandhi was present in Ahmedabad, along with Sardar Vallabhai Patel, to donate the collection of the library at Sabarmati Ashram to the Ahmedabad municipality.[1] Gandhiji's words on the occasion reiterated his fundamental philosophy and preference for the idea of trusteeship over private property.[2] He saw the role of a library as a trustee of knowledge. Gandhiji professed anguish at the sight of invaluable books wrapped in silk, but inaccessible because they were stored in private houses, and he hoped that the city would be host to the biggest libraries in the country and that Harijans would be given free admission to the library. It is abundantly clear from his words that Gandhiji envisaged libraries as institutions that served multiple public functions including making knowledge publicly accessible, and shouldering the responsibility of uplifting those who were downtrodden and marginalised.

Gandhiji was not alone in recognising the importance of libraries as democratic institutions. His inauguration of the library in Ahmedabad coincided with the growth of the people's library movement that had sprung all across India.[3] This movement was predicated on a commitment to the importance of literacy and education in the cultivation of an informed public sphere of citizens who would be ready to take on the mantle of governance in free India.[4] Nowhere was this challenge more readily accepted than in the legal profession. The

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[1] Mohandas K. Gandhi, *Speech at Ahmedebad-II*, 56 Collected Works of Mahatma Gandhi (CWMG) 13 (September 21, 1933).

[2] Mohandas K. Gandhi, *My Socialism,* Navajivan Trust (1959), 40. Interestingly Gandhi did not limit his concept of trusteeship intangible property alone, and he had a very nuanced understanding of the relation copyright and public good. See Shyamkishna Balaganesh, *Gandhi and Copyright Pragmatism*, 101 Calif. L. Rev. 1705 (2013).

[3] As early as 1930, Dr. S.R. Rangnathan, who was subsequently recognised as the father of library science in India, had drafted a model public library law and presented it at the first Asia conference at Varanasi in 1930. *See* Abhishek Kumar, *Development of Public Library System in India,* 6 JETIR 6 (June 2019).

[4] For an account of the legacy of the library movement and its impact on literacy in India see Francis Cody, *The Light of Knowledge: Literacy Activism and the Politics of Writing in South India,* Cornell University Press (2013).

large number of lawyers who played a crucial role in the freedom struggle is testament to the importance of legal education in promoting political democracy.[5]

1.1 Inaccessibility of Legal Materials in India Law Schools

It is impossible to overstate the contribution of legal education and the role played by law libraries in the formation of postcolonial Indian identity and the cultivation of critical citizenship. Given the rich legacy of libraries and the centrality of legal education in the formation of a national consciousness, one would have assumed that legal universities and law colleges in India would by now have amassed vast collections, comparable to their peers, the law schools of other leading universities across the world. But a perusal of the holdings of the leading law universities as well as smaller law colleges in India paints a dismal picture, especially when compared to their counterparts in the Global North (See Table 1).

Table 1: Comparative Chart of Library Holdings and ratio of books to students[6]

India				United States			
Name of institution	**No. of students**	**Library holdings**	**Ratio of books to students**	**Name of institution**	**No. of students**	**Library holdings**	**Ratio of books to students**
NLSIU, Bangalore	800	38,805 (only physical books)	48:1	Harvard Law School	1,990	2 Million	1,005:1
NLU Delhi	868	37,500	43:1	Yale Law School	685	1 million	1,459:1
Faculty of Law, Delhi University	1,50,000	7,000	21:1	Univ. of Chicago Law Library	675	7,00,000	1,037:1
Indore Institute of Law	1,953	13,380	7:1	Syracuse Univ., Law Library	650	5,58,439	859:1
North-Eastern Hill University Law Library, Shillong	328	3,500	11:1	University of Maryland, Law Library	900	4,84,007	537:1

[5] *See* Justice Dipak Misra, *Role of Lawyers in Nation Building,* Bharati Law Review (2012). *See also* Yves Dezalay, *The Role of Lawyers in South and East Asia,* UC Irvine School of Law, Research Paper No. 2016-45 (2016).

[6] Based on information taken from the Internet and from communication with librarians at various law universities.

Seen in absolute terms, the difference between the holdings of law libraries in the United States and India is not surprising given that many of the universities in the U.S are much older and wealthier. What is startling though is the degree of disparity that exists between the two countries when it comes to ratio of books to the number of students. It is pertinent to note that institutions like the National Law School (Bangalore) or the National Law University Delhi are amongst the leading law schools in India and if one were to do a comparison with smaller colleges or universities, the difference would be even more striking. It highlights the extreme inequity that persists in the domain of access to knowledge[7] and learning materials and confirms claims that scholars and activists have made about the persistence of neocolonial structures of ownership and access to learning materials between the Global North and the Global South.[8]

As a result of the relatively modest collections in law colleges across India, students face immense challenges in accessing both basic legal materials as well as advanced research and scholarly books. This further translates into library policies that are not very conducive to promoting research and scholarly enquiry such as limited borrowing time (often restricted to a day), numerous students requiring access to books of which the library only has a single copy, and often required books just not being available in the library. While we have taken the example of a standard law library, the same inequities persist in other disciplines such as medicine and engineering, and it is also more generally true of all educational institutions.

A significant part of the burden on providing efficient and equitable access to students falls on libraries and librarians, and despite the best intentions of libraries to address this deficit, they have historically been curtailed by the very nature of libraries which for the longest time were dependent on the technology of paper. Books and journals, when they exist in the form of paper are limited in terms of physical circulation and become competitive goods in that the use of a book by one person necessarily means an exclusion of its use by others. The digital transformation of the past few decades has heralded a seismic shift in the practice of libraries

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[7] Gaille Krikorian and Amy Kapczynski (eds.), *Access to Knowledge in the Age of Intellectual Property,* Zone Books and Open Society Foundations (2010).

[8] Joe Karaganis, *Shadow Libraries: Access to Knowledge in Global Higher Education,* MIT Press (2018).

and expanded the democratic possibilities of deepening and widening access to learning materials. Consider for example one simple instance: if earlier, a student or researcher required a chapter or an extract of a book, the only possibility open to them was to either copy by hand the section that was required or to make a photocopy of the same, but even the making of a photocopy of the book necessitated the physical possession of the book as well as taking it out of circulation for the duration that it took to make the photocopy.

One of the earliest instances in which we witnessed the transformational potential of digitising books was through what was called "document delivery services" where libraries would scan and send extracts of individual chapters to faculty members or students and researchers.[9] This relatively simple technological facilitation of a library service immensely increased the efficiency of time and labour, both for librarians as well as for readers. For a librarian, the effort involved in scanning a book once and having the same material available for future users or for multiple users is of enormous significance, while for the researcher it does away with the uncertainty of a particular book being available at a time when it is needed. But if technology facilitates the democratising of libraries, there are other challenges that impede such possibilities and the most significant one comes in the form of copyright laws and university library policies.

In this paper we will evaluate the overlap between technology, copyright law and exceptions and limitations within copyright including fair use, from the perspective of deepening and widening access to learning materials. We begin with an examination of the nature of exceptions and limitations within copyright law, the normative goals that they aim to fulfill, the constitutional dimensions of access to knowledge and we offer a theory of a composite reading of fair use in India that brings together these different aims. We then examine specific exceptions within Indian Copyright Law including the visual disability exception, the library exception, educational exception, and the personal use and research exception, to consider their pertinence and adequacy in enabling greater access to knowledge. Finally, we explore an innovative technological model for widening and deepening access, namely controlled

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[9] *See Model National Interlibrary Loan Code,* International Federation of Library Associations and Institutions (IFLA) (1983, Revised 2000).

lending and examine the extent and scope to which it may be deployed under copyright law in India.

1.2 The Digitisation of the NLSIU Library

Our investigation of these issues is not theoretical. Under the auspices of Public.Resource.Org ("Public Resource"), a registered U.S. public charity, we are working under a Memorandum of Cooperation with the National Law School of India University (NLSIU) to digitise the full holdings of the law library.[10] Under the agreement, Public Resource has built and installed 10 state-of-the-art scanners and bears the cost of the equipment and staffing. NLSIU furnishes a space in the library with electricity and Internet. No funds are exchanged in this agreement.

This arrangement is similar to work Public Resource has carried out with other institutions in India over the last five years, including the Indian Academy of Sciences in Bengaluru, the Roja Muthiah Research Library in Chennai, and the World Konkani Centre in Mangaluru. Public Resource has also assisted institutions such as CSRI national laboratories in digitisation efforts, and has scanned numerous cultural and historical works in Kannada and many other languages. Our online collections now include over 1.3 million texts, movies, audio, and images.

The digitisation process is conducted in cooperation with supporting institutions such as the Internet Archive, a registered public charity in the United States. Materials are scanned, cropped, de-warped (to account for the curl in pages of bound books), de-skewed, and metadata is entered. Optical character recognition, including for all Indian languages is conducted, then the materials are transformed into additional formats such as e-books.

The initial use of the materials is simple. Firstly, all public domain books are available on the Internet Archive for free use, but since other materials are still in copyright, those are only available to certified print disabled users. The second initial use is archival: a copy of all scanned materials is copied back to NLSIU for preservation purposes. Our goal, and the

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[10] Public Resource and National Law School of India University, *Memorandum of Cooperation* (February 16, 2022).

purpose of this paper, is to make wider use of the materials within the parameters under the law permitted for a publicly supported academic institution, in this case NLSIU. Our analysis also applies to other public academic institutions in India and more broadly to other libraries and also to individual users.

This project takes a conservative and deliberate approach to this issue. There are a number of standard practices for libraries—for example interlibrary loan, support of faculty in the course of their research, support for the visually impaired, and support for students in the course of their education—that are commonly practiced in all libraries, along with the archival function and support for the visually impaired described previously. By conducting this analysis, we are able to provide guidance to our own efforts and to other libraries as they adjust to changing technology within the pillars of established law and practice. We believe, as described in this paper, that carefully controlled lending supports a number of uses under the law.

In particular, the doctrines of first sale and exhaustion—fundamental underpinnings of the law of copyright and the basis for the operation of libraries worldwide—supports the lending of books. A physical book can be scanned, and this digitised book is coupled with the physical book: they are two instantiations of the same object. The digital version can be archived for preservation and made available to the visually impaired. It can be loaned to a reader in the course of their research and instruction, so long as the number of copies of a book circulating is the same as the number of copies acquired. In other words, if the library purchases one book, they may loan one copy of that book at a time. This is known as the "own to loan" ratio which is described in further detail in this paper, and is one of many practices of controlled lending that govern the operations of libraries.[11]

Currently, the project (as well as the physical library) provide access to the library within the scope of the community of students and faculty that make up NLSIU. However, access to legal materials in law schools in India is a huge issue, particularly in the smaller law schools. We envision a National Law Library of India which provides the same services we hope to

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[11] David R. Hansen and Kyle K. Courtney, *A White Paper on Controlled Digital Lending of Library Books,* Harvard University (2018).

provide at NLSIU to a consortium of law schools that are able to pool their resources together to provide greater access to the law schools of India. This is similar to services in other countries, such as the HathiTrust Digital Library, which has digitised and provides access to 17 million books under carefully formulated access policies to control the use of the collection and provide service to over 250 major universities located throughout the world.[12]

HathiTrust provides many of the same services we envision for India, in particular for the community of law schools. Digitisation of the books provides an archival function, and all books are available to the visually disabled. The entire digitised corpus is available for searching, provide a vastly improved version of the traditional card catalogue. One can, for example search the text of the books looking for particular phrases. All of the HathiTrust public domain books are available to all users, those under copyright are provided to member institutions under carefully controlled lending and access policies. One of the more intriguing uses is the HathiTrust Research Center, which allows computational scholars to search the entire corpus for research purposes, a process at the forefront of modern computer science known as text and data mining (TDM). TDM has particular promise for legal texts.[13]

2. Exceptions and Limitations in Copyright Law

Copyright law, like all intellectual property law, is a balancing act. Contrary to the simplistic fairy tale story often told by media corporations about copyright being a system of ironclad rules for the absolute protection of authors and creators against unlawful appropriators, in reality the story is far more nuanced and complex. Intellectual property in general, and copyright in particular is in fact an intricate system whose primary purpose seeks to nurture knowledge through an enrichment of the public domain.[14] It does this by creating a system of incentives in the form of limited rights for authors and creators, bearing always in mind the need to balance between granting rights to creators and ensuring that these rights are not exercised in a way that is prejudicial to the larger aim of copyright, the promotion of public

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[12] By-Laws of HathiTrust (Adopted February 12, 2013, last modified June 19, 2019.

[13] *See* Matthew Sag, *The New Legal Landscape for Text Mining and Machine Learning,* 66 Journal of the Copyright Society of the USA 291 (2019).

[14] Boyle, James, *The Public Domain: Enclosing the Commons of the Mind*, Yale University Press (2008).

knowledge. It accordingly builds into the system checks and balances to ensure that copyright does not veer too far away from its public domain goals.[15]

This dual objective, of promoting creativity in order to promote public knowledge, can be found even at the inception of copyright, and the very first copyright law in the world, the Statute of Anne, 1710 was designated an "an act for the encouragement of learning."[16] It is accordingly important to appreciate the normative design that underlies the copyright system as one that has as its central aim, the promotion of learning.[17] We use the terms "normative design" and "copyright system" self-consciously to acknowledge that copyright law is the creation of law and not a natural right.[18] It is important to understand the difference between the two if we are to properly appreciate the underlying principles of balance that are built into copyright law.

Copyright attempts to maintain a delicate balance between the grant of exclusive rights to owners of copyright and the interest of the general public in being able to access materials without impediments.[19] Exclusive rights are granted to authors on the premise that the ability to monetize these rights serves as an incentive for authors to create more works, thereby

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15 See Laurence R. Helfer, *Toward a Human Rights Framework for Intellectual Property*, 40 U.C. Davis Law Review 971, 1013 (2007).

16 Parliament of Great Britain, *The Statute of Anne,* 8 Anne, c. 19 (1710).

17 L. Ray Patterson, *Free Speech, Copyright, and Fair Use,* 40 Vanderbilt Law Review 1 (1987). *See also* Tyler Trent Ochoa and Mark Rose, *The Anti-Monopoly Origins of the Patent and Copyright Clause,* 84 J. Pat. & Trademark Off. Soc'y 909 (2002).

18 Justice Endlaw, in his decision in the Delhi university photocopy case, makes the following observations about whether copyright is a natural right: "Copyright, specially in literary works, is thus not an inevitable, divine, or natural right that confers on authors the absolute ownership of their creations. It is designed rather to stimulate activity and progress in the arts for the intellectual enrichment of the public. Copyright is intended to increase and not to impede the harvest of knowledge. It is intended to motivate the creative activity of authors and inventors in order to benefit the public". The Chancellor, Masters & Scholars of The University of Oxford & Ors v. Rameshwari Photocopy Services & Anr. 2016 (68) PTC 386 (Del), ¶ 80.

19 Pamela Samuelson, *Justifications for Copyright Limitations & Exceptions,* in Ruth Okediji (ed.), Copyright Law in an Age of Limitations and Exceptions, Cambridge University Press (2017). *See also* Ruth L. Okediji, *The Limits of International Copyright Exceptions for Developing Countries,* 21 Vanderbilt Journal of Entertainment and Technology Law 689 (2020).

enriching the public domain.[20] However there is also a recognition of the fact that an absolute monopoly over knowledge goods would potentially impair the public domain by creating barriers to accessing materials, which is a precondition for the creation of future works.[21]

Copyright law achieves this balance by incorporating a set of legal measures that circumscribes an author's rights to ensure that the exercise of these rights do not impinge on the legal rights of users to access materials.

These restrictions can take various forms including :

a. Threshold Criteria : These are conditions that have to be satisfied such as authorship and originality before copyright can be claimed on a work. The criteria of originality also exclude certain works that have a functional purpose such as accounts books.[22]

b. Term of Copyright: Copyright is not a right in perpetuity, and temporal duration of copyright ensures that works enter the public domain after the expiry of their term.[23]

c. Statutory and compulsory licenses: Permission for usage obtained not from the copyright owner, but through statutory bodies.

d. Fair Dealing : A wide ranging set of exceptions guided either by general principles (fair dealing) or enumerated exceptions for specific classes of works, specific sets of

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[20] Lawrence Lessig, *Free Culture: How Big Media Uses Technology and the Law to Lock Down Culture and Control Creativity*, Penguin Press (2004).

[21] "The limited scope of the copyright holder's statutory monopoly . . . reflects a balance of competing claims upon the public interest," Fantasy v. Fogerty, 510 U.S. 517 (1994), quoting Twentieth Century Music Corp v. Aiken, 422 U.S. 151, 156 (1975).

[22] In Baker v. Selden, 101 U.S. 99 (1870) the US Supreme Court ruled that while the expression of a particular system (in this case the creation of ruled account-books) may have copyright, the underlying idea may not, and in instances where granting copyright to an expression amounts effectively to a copyright over the idea, then copyright cannot be granted. This doctrine has come to be known as the idea-expression dichotomy in copyright.

[23] Interestingly, Gandhiji's name is indirectly associated with the term of copyright in India. After the copyright in his works had come to an end, it was proposed that the term of copyright in India. Extended by 10 years, similar to the way that it has been extended in the United States on several occasions. the foundation in charge of one these writings were however opposed to an extension of the term of copyright as they felt that it was not something that Gandhi would have approved. *See* Shyamkrishna Balganesh, *Gandhi and Copyright Pragmatism,* 101 Calif. L. Rev. 1705 (2013). *See also Tagore Copyright Freedom at Midnight,* The Telegraph (December 30, 2001).

users (libraries, disabled users for instance), or specific use instances such as research, education etc.[24]

These are incorporated within international treaties and conventions as well as reflected in specific national legislations, and finally the general nature of these exceptions and limitations are given flesh through judicial interpretation appropriate to the development and knowledge goals of particular countries. Thus, in a 2011 decision, the Delhi high court stated exceptions to copyright, coupled with a limited copyright term, guarantees "*not only a public pool of ideas and information but also a vibrant public domain in expression, from which an individual can draw as well as replenish.*"[25]

The focus of this paper will be on the last set of legal measures namely fair dealing exceptions in the Indian context. We will first establish the international framework that allows for countries to incorporate flexibilities by way of exceptions and limitations within their national legislations. We then provide a general overview of the nature of the fair dealing exception in Indian Copyright law and its interpretation by judicial decisions, and finally we will examine specific exceptions under Section 52 of the Copyright Act.

Copyright is an intricate system that covers not merely very different classes of works (ranging from literary works to software and films), but also very different use scenarios (from adaptation of literary works to film, educational use of academic materials to use of sound recordings in cultural events such as marriages). One of the dangers of treating the copyright system as one-size-fits-all model is its reduction into a unidimensional apparatus for the arrangement of private rights. In this paper we demonstrate why a holistic approach to copyright from the perspective of an ecology of knowledge allows us to understand the interaction of its various parts including the important exceptions and limitations that have been placed on it.

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[24] Radhika Bhusari, *Fair Dealing Under the Copyright Law: A Critical Analysis,* Intl. J. of Law Management and Humanities, Volume 5, Issue 1, 1077 - 1089 (2021).

[25] University of Cambridge v BD Bhandari, 47 PTC 244 (DB) (2011), 105.

2.1 Exceptions and limitations in copyright: The International Framework

The internationalization of copyright standards across different countries has evolved through over a series of multilateral intellectual property treaties and conventions, beginning with the Berne Convention (1886) and culminating in the TRIPS Agreement (1990).[26] There have subsequently been a number of significant multilateral treaties which are either thematic such as WIPO's Performances and Phonograms Treaty, or aimed at addressing specific exceptions and limitations such as the Marrakesh Treaty on access by the visually impaired.[27]

These agreements lay down the minimum threshold that have to be met by countries when drafting their copyright laws, and while they define a minimum standard of protection, these agreements also provide countries considerable flexibility in determining appropriate exceptions and limitations that ought to be incorporated within their national copyright regimes. Additionally, the agreements also lay out broad normative parameters that govern their interpretation, and a perusal of some of the provisions makes it abundantly clear that these multilateral agreements do not promote a narrow or singular idea of copyright as a regime of the protection of rights of owners alone.[28]

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[26] For a sharp political critique see S. K. Sell, *TRIPS: Fifteen Years Later,* J. of Intellectual Property Law, Vol. 18, No. 2 (2011). *See also* Carolyn Deere, *The Implementation Game: The TRIPS Agreement and the Global Politics of Intellectual Property Reform in Developing Countries,* Oxford University Press (2009). See also Sebastian Haunss, *The Politicization of Intellectual Property: IP Conflicts and Social Change,* WIPO Journal, Vol. 3, No. 1 (2011).

[27] The Marrakesh treaty attempts to "Facilitate Access to Published Works for Persons who are Blind, Visually Impaired or Otherwise," and will be discussed in greater detail below. *See also* WIPO, *Performances and Phonograms Treaty,* TRT/WPPT/001 (1996).

[28] *See* Shyamkrishna Balganesh, Ng-Loy Wee Loon, and Haochen Sun (eds.), *The Cambridge Handbook of Copyright Limitations and Exceptions,* Cambridge University Press (2021). In their introduction, the authors succinctly capture the key issues: "Properly crafted limitations and exceptions are of pivotal importance to mediating copyright law's promise of providing creators with an incentive to produce new works and its devotion to affording the public access to these works, once brought into existence. They also shape a host of copyright law's additional ideals in promoting democracy and cultural progress in ways that the system's framework of exclusive rights cannot deliver on its own."

Articles 7 and 8 of the TRIPS Agreement lay out factors that member states are supposed to take into account while implementing their obligations.[29] Article 7 titled "Objectives," provides:

> *The protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge, and in a manner conducive to social and economic welfare, and to a balance of rights and obligations.*

Article 8(1) provides that member states may, in formulating or amending their laws and regulations, adopt "measures necessary to protect public health and nutrition, and to promote the public interest in sectors of vital importance to their socio-economic and technological development, provided that such measures are consistent with the provisions of this Agreement." Article 8(2) further allows for "appropriate measures … consistent with the provisions of this Agreement" that may be needed to prevent the abuse of intellectual property rights (IPRs) or "practices which unreasonably restrain trade or adversely affect the international transfer of technology."

It is clear from these provisions that a significant purpose of the TRIPS agreement is to promote the beneficial development of a nation's technological, scientific and knowledge capabilities. Consequently, any interpretation of the TRIPS agreement will have to bear in mind the agreement's object and purpose, and it would be necessary to weigh the interests of rights holders against other competing public interests, such as educational and developmental concerns. Both the Berne Convention and the TRIPS agreement contain an omnibus exception clause agreement allowing countries to incorporate flexibilities within their national legislations. Article 9(2) of Berne[30] provides for the following:

> *It shall be a matter for legislation in the countries of the Union to permit the reproduction of such works in certain special cases, provided that such*

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[29] World Trade Organization, *Agreement on Trade-Related Aspects of Intellectual Property Rights* (as amended on 23 January 2017).

[30] World Intellectual Property Organization, *Berne Convention for the Protection of Literary and Artistic Works* (as amended on September 28, 1979).

reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author.

Article 9(2) defines three standards (commonly known as the three-step test) that any exception must fulfill:

a. It must be a special case;

b. It must not conflict with the normal exploitation of the work;

c. It must not unreasonably prejudice the legitimate interests of the author.

Article 13 of the TRIPs provides its own version of the three-step test as follows: Members shall confine limitations or exceptions to exclusive rights to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder. These agreements also contain exceptions that address specific needs such as education. Article 10(2) of Berne for instance allows national legislation in the countries of the Union "to permit the utilization, to the extent justified by the purpose, of literary or artistic works by way of illustration in publications, broadcasts or sound or visual recordings for teaching, provided such utilization is compatible with fair practice."

It is globally acknowledged that one of the most effective ways of promoting equitable access to knowledge, especially in the arena of education, is by ensuring that copyright laws have strong exceptions that enable the fair use of material for educational purposes. As P. Bernt Hugenholtz and Ruth Okediji argue: "Unfortunately, the idea of public interest in copyright has tended to focus on one aspect, namely the maximum protection of creative enterprise through the grant of exclusive rights to authors. The other component of public interest - that of ensuring optimal access to creative works and stimulating broad dissemination of knowledge and downstream creativity–has been historically left to the discretion of individual States, thus producing a patchwork effect with respect to copyright limitations and exceptions."[31]

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[31] P. Bernt Hugenholtz and Ruth L. Okediji, *Conceiving an International Instrument on Limitations and Exceptions to Copyright: Final Report,* The Open Society Institute (2008).

Exceptions and limitations can be in the form of statutory or compulsory licenses, or they can be incorporated into fair dealing provisions. These can either be compensated or uncompensated, though generally within the context of fair dealing provisions, uses are uncompensated. In the early 2000's the United Kingdom established a commission to examine various aspects of IP. In their final recommendations, the Commission recognized a strong link between developmental goals and intellectual property exceptions, and proposed:

> *In order to improve access to copyrighted works and achieve their goals for education and knowledge transfer, developing countries should adopt pro-competitive measures under copyright laws. Developing countries should be allowed to maintain or adopt broad exemptions for educational, research and library uses in their national copyright laws. The implementation of international copyright standards in the developing world must be undertaken with a proper appreciation of the continuing high level of need for improving the availability of these products, and their crucial importance for social and economic development.*[32]

There has been considerable debate about how the provisions of IP treaties are to be interpreted, and understandably there is a sharp divide between interpretative approaches that seek to promote the interests of the public domain and those that merely desire to secure the commercial interests of copyright owners. While the former advocate a broad and inclusive interpretation, the latter favor narrow technical interpretation of these provisions. This is particularly true when it comes to an interpretation of the limitations that are placed on utilization of a work that is provided as an exception to the normal rules of copyright.

The differences in approach to interpreting these treaties have enormous consequences for the design of copyright laws in developing countries. For instance, what do the three terms in the teaching exception in Article 10(2) of the Berne convention mean, and what educational uses

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32 Commission on Intellectual Property Rights, *Integrating Intellectual Property Rights and Development Policy* (2002).

do they cover?[33] Can there be quantitative restrictions placed upon the use of a work based on an interpretation of the provision? Scholars who advocate of broad interpretation would argue that as long as the qualitative criteria are satisfied, there can be no argument that can be made for defined quantitative restrictions.[34] This argument is supported by IP scholars like Samuel Ricketson who states that "the words 'by way of illustration' impose some limitations, but would not exclude the use of the whole of a work in appropriate circumstances."[35]

The question of interpretation is therefore not merely a technical legal issue, but one that substantively impinges on what is or is not allowed within these exceptions. An example of a major conflict between a narrow and an expansive interpretation arose in the Delhi University photocopy case (to be discussed in detail in Part 6) over what constitutes "instruction" in Section 52(1)(i), the educational exception provision of the Indian Copyright Act. The petitioners sought to restrict "instruction" to a classroom context in which there was a direct face-to-face interaction between the teacher and the student. They argued that reproduction could only be allowed in such a situation and does not cover the prescription and preparation of course packs. At the core of the dispute was the question of when instruction begins and ends. While the petitioners sought a spatial understanding of instruction, the defendants argued for a temporal understanding of instruction which begins much before the classroom interaction and continues after it as well.

The effect of adopting the petitioner's argument would have been a reductionist and instrumental understanding of education, with serious consequences not just for the question

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[33] "2) It shall be a matter for legislation in the countries of the Union, and for special agreements existing or to be concluded between them, to permit the utilization, to the extent justified by the purpose, of literary or artistic works by way of illustration in publications, broadcasts or sound or visual recordings for teaching, provided such utilization is compatible with fair practice." WIPO, *Berne Convention for the Protection of Literary and Artistic Works* (Paris Text 1971), Article 10(2).

[34] S Ricketson, *WIPO Study on Limitations and Exceptions of Copyright and Related Rights in the Digital Environment,* SCCR/9/7 (Standing Committee on Copyright and Related Rights (5 April 2003) at p.14 [hereinafter "WIPO Study"]. For an argument that utilization includes digital uses, as well as the rights to reproduction and communication, see R. Xalabarder, *Copyright and Digital Distance Education: The Use of Pre-Existing Works in Distance Education Through the Internet*, 26 Columbia Journal of Law & the Arts 101 (2003), 156 arguing that the term utilization, does not only include the right to reproduce a work, but also includes the "right of communication to the public, thus easily encompassing digital distance teaching as well as broadcast distance teaching."

[35] WIPO Study *op. cit.*

of copyright and access to learning materials but one that would have established a jurisprudence of education completely at odds with the actual manner in which teaching takes place. An ordinary meaning of the word "teaching" as "the imparting of instruction or knowledge"[36] places no limits on where the knowledge is imparted or where the instruction takes place. Therefore, the term can be applied to imparting of education at public and private institutions at all levels, and to face-to-face instructions at a formal institution or through digital distance learning. Thus, there appears to be no reason why teaching should be defined strictly in terms of actual classroom instruction[37] nor any reason to exclude distance learning from the scope of the term.[38]

Margaret Chon similarly argues for a broad interpretation stating that, "in developing countries, a substantive equality principle would suggest the fullest expansion of this Berne-endorsed exception whenever possible."[39] It is well established now that the Three-Step Test should not prevent legislatures from introducing open-ended limitations and exceptions, so long as the scope of such limitations and exceptions is reasonable. Interpretation at this level still primarily refers to the ways in which lawmakers interpret international treaties for the purposes of creating laws at a national level. It will however, eventually be the judiciary that interprets the national legislations both in the light of the Constitution as well as through references to international treaties.

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36 James A. Murray (ed.), Oxford English Dictionary, "Teaching," Oxford University Press (1933), Vol. XI (T-U), 127.

37 In a discussion at the Stockholm Conference, a narrow interpretation of the term "teaching" was advocated as the Committee's Report considered it as follows: "The wish was expressed that it should be made clear in this Report that the word 'teaching' was to include teaching at all levels – in educational institutions and universities, municipal and State schools, and private schools. Education outside these institutions, for instance general teaching available to the general public but not included in the above categories, should be excluded." Report of Main Committee (I) quoted in S. Ricketson, *WIPO Study on Limitations and Exceptions of Copyright and Related Rights in the Digital Environment,* presented at the WIPO SCCR meeting (Geneva, June 23 to 27, 2003),WIPO SCCR/9/7.

38 R. Xalabarder, *Copyright and Digital Distance Education: The Use of Pre-Existing Works in Distance Education through the Internet*, 26 Colum. J.L. & Arts 101 (2003).

39 M. Chon, *Distributive Justice and Intellectual Property: Intellectual Property "From Below": Copyright and Capability for Education*, 40 U.C. Davis L. Rev. 838 (2007).

3. Constitutional Underpinnings of Fair Dealing in India

Differences between the design of various national copyright laws reveal a lot about differences between the priorities and goals of economically developed and developed countries respectively.[40] An examination of the ways that national legislations make use of flexibilities provided under the TRIPS agreement and the Berne Convention provide us us insights into the social and economic context in which questions of copyright and access to knowledge play out.[41] In this section we turn to the two models of providing equitable access within copyright law, the American model (known as "fair use") and the British model (known as "fair dealing"). We examine how the two models respond differently to questions of equitable access. We assess which model is better suited for a developing country and also propose a composite reading of fair use as the most suitable interpretive model in such countries.

In the United States, there are no statutorily enumerated exceptions and the determination of whether a particular use falls under the fair use defense is dependent on what is termed as the four factor test. The four factor test examines

a. The purpose and character of the use.
b. The nature of the work.
c. The amount and substantiality of the portion used in relation to the work as a whole.
d. The effect of the use upon the potential market.

Under this model there are no bright line rules that clearly establish exceptions for the use of copyright work, and instead individual use instances are subject to the four factor test and to doctrinal standards established by judicial precedent.[42]

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[40] C. M. Correa, *Interpreting the Flexibilities Under the TRIPS Agreement,* Research Paper No. 132, South Centre (2021).

[41] Jennifer M. Urban and Anthony Falzone, *Demystifying Fair Use: the Gift of the Center for Social Media Statements of Best Practices,* 57 J. of the Copyright Society 337 (2010).

[42] *See* Barton Beebe, *An Empirical Study of U.S. Copyright Fair Use Opinions Updated, 1978-2019,* 10 NYU J. of Intellectual Property & Entertainment Law 1 (2020).

A sharp contrast to this model can be found in the Copyright Act of the UK, and because Indian copyright law was modelled on English copyright law, in the Copyright Act of India.[43] This is the system known as "fair dealing." In the UK and in India there is an explicit statutory provision (Section 52 in the case of India) which comprehensively lists out a range of uses which would not be considered infringement of copyright. This, however, does not mean that general principles of fairness are not applicable in the English or in the Indian context. But, what it does imply is that in addition to uses which are covered by an all-encompassing provision which is subject to the test of fairness, there are also uses which are not considered infringement for various policy reasons, or in other cases where the use may be considered to be presumptively fair.[44]

Thus, it is pertinent to note that Section 52 of the Copyright Act which is popularly referred to as the fairness provision, does not actually have a phrase "fair use" or "fair dealing" in the title of the section. Instead, the section is titled "Certain acts not to be infringement of copyright." The section defines acts which shall not constitute an infringement of copyright and while some subsections of Section 52 make an explicit reference to fairness, there are many other subsections that do not make any reference to fairness and instead explicitly outline uses which are not considered infringement. For instance Section 52(1)(a) allows for "a fair dealing with a literary, dramatic, musical or artistic work [not being a computer programme] for the purposes of private use including research." In contrast there is also a provision such as Section 52(c) which allows for "the reproduction of a literary, dramatic, musical or artistic work for the purpose of a judicial proceeding or for the purpose of a report

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[43] See T.G. Ajitha and N.S.Goplakrishnan, *The Imperial Copyright Act 1911 and the Indian copyright law,* in Uma Suthersanen and Ysolde Gendreau (eds.), *A Shifting Empire,* Edward Elgar Publishing (2013), 116.

[44] For a detailed discussion on fair use law in India see the West Bengal National University of Juridical Studies, *Special Issue on Copyright Amendment,* 5 NUJS L. Rev. (Issue 4) (2012). *See, e.g.*, Shamnad Basheer, *The Copyright (Amendment) Act 2012: A Fair Balance?*, 5 NUJS L. Rev. 1 (2012).

of a judicial proceeding."[45] It is significant that the phrase "fair dealing" is present in the former but absent in the latter.[46]

The difference between an exception to copyright that requires a satisfaction of the criteria of fairness compared to a statutory exception which does not need to meet the test of fairness has immense consequences. Consider for instance the educational exception under the Section 52(1)(h) of the Copyright Act in India which allows for the "reproduction of a literary, dramatic, musical or artistic work and by a teacher or a pupil in the course of instruction." Is this exception subject to an additional requirement of having to pass the standards of the fairness test, or is it distinct from the fairness test, which in the case of the Copyright Act in India, seems to have been imposed only for personal use?

The Delhi High Court, in their two decisions[47] on the scope of the educational exception, had an opportunity to consider this question in detail. It had been contended by the publishers that regardless of language, fairness-derived limits ought to be read into this provision and the content of those fairness limits should be borrowed from the US fair use test.[48] It is understandable why the petitioners found the inclusion of a fairness standard derived from the four factor test attractive as the third and fourth factors of the US test refer respectively to the quantum of material taken and the impact of the defendant's use on the potential market of the work.

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[45] In the UK Copyright Designs and Patents Act 1988, there is specific reference to fair dealing as an additional requirement only in Sections 29 (research and private study) and 30 (criticism, review, quotation and news reporting).

[46] For a discussion of various standards that have been adopted while interpreting fair use by courts in India see M. P. Ram Mohan Aditya Gupta, *Right to Research and Copyright Law: From Photocopying to Shadow Libraries*, W. P. No. 2021-09-03, 30-32.

[47] The Chancellor, Masters & Scholars of The University of Oxford & Ors v. Rameshwari Photocopy Services & Anr. 2016 (68) PTC 386 (Del) (Endlaw J) (Hereafter, Delhi HC); affirmed in part on appeal 2017 (69) PTC 123 (Del) (Nandrajog and Khanna JJ) (Hereafter, Delhi DB) in September 2016.

[48] Delhi HC ¶ 14; Delhi DB ¶ 27. The plaintiffs were supported by a precedent which suggested that "fair use" or "fair dealing" should be read in as a general threshold requirement for all the provisions of Section 52(1). See Syndicate of the Press of the University of Cambridge v. BD Bhandari & Ors 2011 (47) PTC 244 (Del DB).

Both the single judge bench and the division bench of the Delhi high court expressed deep reservations against this argument. Justice Endlaw drew a clear distinction between the general principles of fair dealing, which were applicable to personal use and research under Section 52(1)(a) and other uses envisaged in the rest of the section. Distinguishing between an omnibus or general clause and a special provision, he concluded that Section 52(1)(h) dealt specifically with the needs of education and could not be expanded or restricted by applying the general principles of fair dealing and broadly applicable tests developed for its interpretation.[49]

The division bench went on to address this question in greater detail. It was willing to accept that there "has to be fairness in every action and irrespective of a statute expressly incorporating fair use, unless the legislative intent expressly excludes fair use." While some degree of fairness should serve as a barometer for all permissible acts, it was clear that the legislature had not incorporated a specific conception of fair dealing or fair use as a limiting principle when allowing for reproduction by teachers and students. "Therefore, the general principle of fair use would be required to be read into the clause and not the four principles on which fair use is determined in jurisdictions abroad."[50]

While the single judge bench had explicitly rejected the necessity of any fairness standard having to be read into the educational exception, the division bench seems to hint at a need to include a fairness standard, but one that is not transplanted from American jurisprudence without a nuanced understanding of the specific requirements of the Indian context.[51] The judicial acknowledgment of the difference between the US model of the four factor test and the Indian model gives credence to the claim that copyright exceptions and limitations should be interpreted keeping the specific context of national jurisdictions and in that sense it could be argued that even though copyright law and doctrine have an international dimension, there is equally a case to be made for the specific national character of these laws and also for interpretations that are in tune with this national character.

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[49] Delhi HC ¶ 43.

[50] Delhi DB ¶ 31.

[51] Lawrence Liang, *Paternal and defiant access: copyright and the politics of access to knowledge in the Delhi University photocopy case*, Indian L. Rev 1:1, 36-55 (2017).

3.1 A Composite Reading of Fairness in India

What then would be an interpretative framework that is more suited to the Indian context? The central question that arises in the Indian context pertains to the relationship between the different exceptions provided for in Section 52 of the Copyright Act. Do we read these exceptions as being relevant to specific instances of use or should we read them keeping in mind both the specific use as well as the larger considerations that marks the structure of Section 52 as a whole? How, for instance, do we understand the relationship between the personal use exception for research, the educational exception and the library exception? Can one deploy principles relevant for one form of exception to other exceptions?

If we were to view an activity such as research and education in a holistic manner, it is abundantly clear that there is a natural and organic relationship between the three. A student relies on learning materials provided either by a teacher or sourced from a library in order to facilitate their academic study or research, and it would appear both unnatural and artificial to divide these activities in terms of space, time or purpose. Any interpretation of provisions of Section 52 have to reflect this organic relationship, and towards that end it important to think of a composite theory of fair dealing in India rather than a fragmented theory that isolates individual users. In conducting this analysis, we can borrow from doctrinal principles of constitutional law which have had to grapple with similar questions.

In the Indian context, early decisions of the Supreme Court in India tended to treat different fundamental rights contained in separate provisions of part three of the Constitution as being self-sufficient and independent codes. This is best exemplified in the Supreme Court's judgement in *A.K.Gopalan v. Union of India*[52] where the courts concluded that the right to personal liberty in Article 21 of the Constitution was different, in substance and form, from the right to freedom of movement in Article 19 of the Constitution.[53] The consequences of

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52 AK Gopalan v State of Madras and Union of India, AIR 1950 SC 27.

53 Anup Surendranath, *Life and Personal Liberty*, in S. Choudhry, M. Khosla, and P.B. Mehta (eds.), *The Oxford Handbook of the Indian Constitution,* Oxford University Press (2016), 756.

such an interpretation was a narrowing of the possibilities of civil liberties and fundamental rights.[54]

The Supreme Court subsequently altered its understanding of the relationship between the different fundamental rights and arrived at an interpretive approach that saw all the different rights as being crucially interlinked to each other rather than distinct. This resulted in a jurisprudence that sees the relationship between articles 14, 19 and 20 as constituting a "golden triangle," and understood as a composite whole rather than as isolated fundamental rights in the Constitution.[55]

We accordingly adopt the same approach to interpreting the various exceptions that exist within Section 52, and submit that a jurisprudence of fair use in India necessarily needs to adopt a composite reading fair use rather than a segregated one. It is only appropriate that we have borrowed from a constitutional history of the interpretation of fundamental rights to develop an argument for a composite interpretation of exceptions and limitations in Section 52 of the Copyright Act, because it is our contention that the fundamental normative principle that informs such a composite reading rest can be derived from the overlap between copyright, education and the constitutionally recognized right to read.[56]

3.2 Right to read in the Indian constitution and the Copyright Act

In contrast with the abundant scholarship that looks at the overlap between copyright and the Constitution in the American context, scholarship on copyright of India has barely engaged with the constitutional dimensions of the right to information, knowledge and the right to read.[57] It would be impossible to evolve a proper appreciation of fair use jurisprudence if it is

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[54] For a detailed discussion see Abhinav Chandrachud, *Due Process* in ibid., 777.

[55] Gandhi v Union of India (1978) 1 SCC 248.

[56] The US Supreme Court has also advanced a theory of composite interpretation. In a leading fair use case, Campbell v. Acuff-Rose, (1994) 510 U.S. 569 (1994), the court concluded that all four factors of the four factor test have to be considered together, and one single factor cannot be privileged over others.

[57] See for instance Yochai Benkler, *Through the Looking Glass: Alice and the Constitutional Foundations of the Public Domain*, 66 Law Contemp. Probl.173 (2003); Lawrence Lessig, *Copyright's First Amendment,* 48 UCLA L. Rev. 1057 (2001); Jed Rubenfeld, *The Freedom of Imagination: Copyright's Constitutionality,* 112 Yale L.J. 1 (2002).

not in dialogue with the jurisprudence of access to information and knowledge that emerges in constitutional cases in India. It is therefore useful to trace the development of the right to information in India.

In 1966, the Delhi High Court expanded the scope of Article 21 to include "a right to acquire useful knowledge," which in the opinion of the Court was "necessary for the orderly pursuit of happiness by free men."[58] The right of citizens to be informed about government's activities was recognized for the first time by Justice K. K. Mathew in State of Uttar Pradesh vs. Raj Narain[59] and subsequently in 1980 the court opined that the ambit of Article 21 includes the provision for facilities of "reading, writing and expressing oneself in diverse forms."[60] Again in 1997, the Supreme Court of India included "social, cultural and intellectual" fulfillments as a part of the right to life.[61] In S.P Gupta v. Union of India[62] the Supreme Court affirmed held that the freedom of speech and expression includes the right to information, a decision which has its roots in the MKSS movement.[63]

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58 Rabinder Nath Malik v Regional Passport Officer, New Delhi, AIR 1967 Del 1 (FB) (Delhi High Court), 24.

59 State of Uttar Pradesh vs. Raj Narain, AIR 1975 SC 865, ¶ 74.

60 Francis Coralie Mullin v. The Administrator, Union Territory of Delhi, 1981 AIR 746 (Supreme Court of India), 8. An interesting comparison can be made to the development of the right to read in Canada. On November 9, 2012, the Supreme Court of Canada released a unanimous decision recognizing that learning to read is not a privilege, but a basic and essential human right. The Supreme Court found that Jeffrey Moore, a British Columbia student with dyslexia, had a right to receive the intensive supports and interventions he needed to learn to read. The school board's failure to provide special education programs and services, including intensive intervention, denied Jeffrey Moore meaningful access to education, resulting in discrimination under the British Columbia Human Rights Code. The Court said: "… adequate special education … is not a dispensable luxury. For those with severe learning disabilities, it is the ramp that provides access to the statutory commitment to education made to all children." The decision confirmed that human rights laws in Canada protect the right of all students to an equal opportunity to learn to read. Moore v. British Columbia (Education), 2012 SCC 61 (Supreme Court of Canada) (2012).

61 Samatha v State of Andhra Pradesh (1997) 8 SCC 191 (Supreme Court of India), 247–248.

62 S.P Gupta v. Union of India, AIR 1982 SC 149.

63 The right to information movement in India began with the Mazdoor Kisan Shakti Sangathan (MKSS) movement to bring in transparency in village accounts through the demand for minimum wages in rural India. False entries in wage rolls were a sign of increasing corruption in the system, which encouraged MKSS to demand official information recorded in government files. *See* Aruna Roy, The RTI Story: Power to the People, Lotus Press (2018).

While the Constitution of India does not explicitly mention right to information, the Supreme Court has read the right to information into Article 19(1)(a) and Article 21 of the Indian constitution which pertain to freedom of expression and speech and right to life and personal liberty respectively. By their account, freedom of speech extends not only to the right of expressing one's views freely but also the right to know. This right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media. Various judgments have affirmed that fundamental right to speech and expression can never be exercised unless information regarding public matters is freely available as stated in cases such as Bennet Coleman v. UOI,[64] SP Gupta v UOI,[65] and Secretary, Ministry of Information and Broadcasting v. Cricket Assn. of Bengal.[66]

Having established the constitutional provenance of the right to information and the right to read, we can now turn to the history of the copyright act to see how this constitutional right finds expressive accommodation within debates on copyright. An ignored archive of copyright policy are the parliamentary debates that record both the legislative intent of the law makers, as well as the core economic, social and other concerns that underline these discussions. As early as 1956, we find fascinating evidence of these issues in a Rajya Sabha debate over the Copyright Act. Kishen Chand, a member of the Rajya Sabha, forcefully articulates a proximate relationship between copyright and the right to read.[67] He begins by asking why there is a presumption of the rights of authors being absolute when this is not the case in any other domain of life, and suggests that as with other activities, copyright needs to be regulated keeping various interests in mind. Chand says "First of all, I do not see any reason why there should be no time limit on the period for which copyright should continue. The limit has been fixed at twenty-five years after the death of the author. It is quite possible

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64 Bennett Coleman & Co v. Union of India (1972) 2 SCC 788.

65 S.P. Gupta v. President of India, AIR 1982 SC 149.

66 Secretary, Ministry of Information and Broadcasting v. Cricket Association of Bengal, 1995 AIR 1236 (Supreme Court of India).

67 Rajya Sabha Debate on the Copyright Bill, 1955 to a Joint Parliamentary Committee (JPC) on February 16, 1956, pp. 75-77.

that one author may live for a very long time, while another may die soon after the publication of his work. I submit that there should be an outer limit of 30 years in any case."[68]

His justification for such a restriction arises from his nuanced understanding of copyright's claim to be a system that incentivizes creativity. Chand brings the question of public interest into incentive theory and argues that "in the interests of society, in the interests of the reading public and also in the interests of the public which enjoys works of art and music, the copyright period should have a maximum period prescribed to it."[69] Questioning whether the Copyright Act actually "safeguards the rights of the reading public," Chand wonders why there should not be a system for the regulation of the prices of books just as there is for the regulation of the price of newspapers.

Implicit in his argument is a connection that he sees between newspapers as a form that promotes access to information, just as books are a form that promote access to knowledge. In a powerful polemic, Chand declares that he would have no objection in giving an author copyright protection even for 200 years, were it not for the fact that there is one more party involved, the reading public. Chand says that one has to weigh the comparative benefits involved, and suggests that even if a few people in India lose money, the benefits of being able to access foreign books at a cheap and affordable price outweighs the costs. Reflecting his socialist leanings, as well as the political mood of the times, Chand concludes powerfully, reminding the house of the umbilical link between copyright and education:

> *"In the literary sphere if a man keeps his books unused or if he does not publish them or publishes them at a higher price, he will be depriving the reading public of the benefits of those books. ... [W]hen our country is going to have compulsory education and adult education and the literary public is going to increase in large numbers, it is very essential that we try to bring down the prices of books and restrict the profits of the authors. Our hon. Members were very careful about the authors, but they did not realise the fate of the poor teacher. After all, if there are no proper teachers, how can*

68 Ibid.

69 Ibid.

education spread? And unless education spreads, where will you find the readers for these books? So I submit, Sir, that Dr. Shrimali, who is in charge of education should realise that, in this Copyright Bill, by trying to safeguard the interests of the authors, he is making the cost of books very high, and in a poor country where the spread of education is very essential, where the teacher is very poorly paid, where a school boy or a school girl has not got any money to purchase books, any money to pay for the fees, to make books dear by this Copyright Bill which has for its purpose the solving of the struggle between the author and the publisher, is not a right step; it is not a step in the right direction."[70]

Kishen Chand's powerful speech should serve, in the words of Georg Simmel, as the "moral memory"[71] of copyright law in India. In his short intervention, Chand anticipated and addressed many of the core challenges that advocates of access to knowledge have faced in the late 20th and early 21st century. Chand was certainly not alone in voicing the interests of students and readers. Another member, Girdhari Lal Bhargava similarly asked questions about whose interests are primary to the Government? "Is it the interest of the works or the author or the copyright holder or the publishers or the reader? To me, it seems that the interest of the readers is to be the primary concern of the Government and perhaps we are all thinking about the interest of the readers."[72] Echoing the concerns raised by Chand and Bhargava, another member, M. Satyanarayana expresses his dismay stating:

"The reading population belongs to the society and they have got a right to expect from the distributor as well as the producer the just rights of theirs and I am afraid this aspect of the matter has not been taken sufficiently into consideration. What will happen to the large number of people in the society that has enabled this man to produce the book. After all, whatever is produced

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[70] Ibid.

[71] Georg Simmel, *Faithfulness and Gratitude,* in Kurt H. Wolff, *The Sociology of Georg Simmel,* Free Press, (1950).

[72] Lok Sabha Debates prior to voting on the Copyright (Amendment) Bill, 1992 on March 17, 1992, 988.

—whether it may be intellectual property or spiritual property or material property—it belongs to the society in the sense that society has enabled this man to produce that property; otherwise, he cannot produce. A man living alone cannot produce anything; if he produces, it will be exclusively for himself and it will not be useful for the whole of society. Therefore, the consumer class should have been taken into consideration."[73]

These debates in the parliament took place at a time when India was at a crucial threshold, moving from the yoked bondage of colonial enslavement into a constitutional realm marked by promises of liberty, equality and fraternity. The lawmakers were prescient in their recognition of the importance of education and equitable access for the formation of a future citizenry even as they were prophetic for the ways in which they foresaw the direction that copyright ownership would go in the second half of the 20th century, and it serves us well to recall these debates at a time when we find ourselves at a similar threshold.

Digital technologies have absolutely transformed the ways in which we can now access hitherto inaccessible materials in the form of books, historical documents, law reports and commentaries to name a few. These are now available to a large majority of people and not just to a small set of elite institutions. But as it was in 1956, so is it now, that we find ourselves confronting the same set of dangers that these lawmakers had alerted us to, an excessively tight leash that copyright places on equitable access, and while the lawmakers themselves did not address the issue directly, we know from our experience of copyright by now that one of the only safeguards against this danger lies precisely in the form of expanded exceptions and limitations within the Copyright Act. We therefore turn now to specific exceptions within copyright law in India to see how they measure up against the normative horizons that we have thus far outlined.

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[73] Rajya Sabha debates prior to voting on the Copyright Bill, 1955, May 14th and 15th, 1957, pp. 303, 304, 306.

4. Visual Disability Exception

> *Even today most books are not born accessible. Organizations like ours typically spend thousand and thousand of rupees in making a book accessible. Thanks to the provision we can officially share our labour and not needlessly duplicate efforts in making an accessible book.*
>
> *Dr. Sam Taraporevala*[74]

A well-known activist in the disability network, Dr. Taraporevala succinctly captures the challenges of enabling access to persons with disabilities when he describes books as not being born accessible. If previously, we have established the problems of access for the general population in India, the situation becomes all the more dire when it comes to access to learning materials for those who are differently abled.[75] It is only in the last two decades that we have seen an enormous improvement in the situation of access as a result of software and the digital turn in reading technologies. Before the advent of digital technologies, people with visual disabilities had to rely on a relative archaic technology, Braille, to be able to read books. While globally, Braille books were already extremely scarce, this lack was further accentuated in developing countries where Braille printing technologies were often very few and where they existed in any large-scale such as those owned by the state, the content that they ended up producing tended to be very narrow and limited, with gazette notifications dominating over fiction and non-fiction.[76]

While the situation has considerably improved with books being available in a digital format as well as technologies such as text-to-speech software, Taraporevala's statement is a useful

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[74] Dr. Sam Taraporevala, Executive Director, Xavier's Resource Centre for the Visually Challenged (XRCVC), St. Xavier's College, Mumbai, email dated June 4, 2022.

[75] For a detailed account of the legal issues involved see Judith Sullivan, *Study on Copyright Limitations and Exceptions for the Visually Impaired*, SCCR15/7, World Intellectual Property Organization (20 February 2007). Sullivan provides an exhaustive summary of previous scholarship on the area that examines the problems that visually impaired people face in being able to access copyrighted works and provides a balanced account of what it would need to create an exception that is cognizant of the interests of copyright holders even as it enables greater access for visually impaired readers.

[76] See, e.g., Panaji, *Goa Government Gazette to Have Braille Version Too,* Deccan Herald (October 2, 2010).

reminder that even in the era of digital books and digital technologies, for a significant portion of the population, books are still not born accessible and there is an additional step that is required before they become accessible. Making books and material accessible in formats accessible by visually impaired persons requires a format shifting of works, and this runs the risk of violating the exclusive right of copyright owners. Additionally, making these accessible format copies available could be impeded by exclusive rights of distribution and publishing.

This is where the law comes in, because the provision that Taraporevala invokes is an enabling provision that has allowed individuals and organisations to increase access amongst the visually disabled. This provision, Section 52(1)(zb), was introduced as an exception to copyright under Section 52 of the Copyright Act in 2012, and has been welcomed by all quarters and used very effectively to promote the digitising of books in disabled friendly format such as JAWS.[77] This provision was brought into the Copyright Act after extensive campaigning by various organisations working on improving access for visually disabled people and it holds a number of lessons for us on the nature of exceptions and limitations and the role it can play in facilitating the realisation of fundamental rights such as the right to read for all persons regardless of their disabilities.

Section 52(1)(zb) reads as follows

> *"The adaptation, reproduction, issue of copies or communication to the public of any work in any accessible format, by—*
>
> *(i) any person to facilitate persons with disability to access to works including sharing with any person with disability of such accessible format for private or personal use, educational purpose or research; or*
>
> *(ii) any organisation working for the benefit of the persons with disabilities in case the normal format prevents the enjoyment of such works by such persons:*

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[77] JAWS is an acronym for "Job Access With Speech."

Provided that the copies of the works in such accessible format are made available to the persons with disabilities on a non-profit basis but to recover only the cost of production: Provided further that the organisation shall ensure that the copies of works in such accessible format are used only by persons with disabilities and takes reasonable steps to prevent its entry into ordinary channels of business.

Explanation.—For the purposes of this sub-clause, 'any organisation' includes an organisation registered under section 12A of the Income-tax Act, 1961 (43 of 1961) and working for the benefit of persons with disability or recognised under Chapter X of the Persons with Disabilities (Equal Opportunities, Protection of Rights and full Participation) Act, 1995 (1 of 1996) or receiving grants from the Government for facilitating access to persons with disabilities or an educational institution or library or archives recognised by the Government;"[78]

The importance of this provision can be gauged from the fact that prior to the introduction of this amendment, there was nothing by way of copyright exceptions that were specifically targeted at enabling access for visually impaired people. This, despite the fact that there were over 285 million blind and visually impaired persons in the world. A World Intellectual Property Organization (WIPO) survey in 2006 had found that fewer than 60 countries have special provision for visually impaired persons in their copyright laws. Furthermore, because copyright law was "territorial," these limitations or exceptions do not usually cover the import or export of works converted into accessible formats. Therefore, organisations in each country earlier had to negotiate licences with copyright holders to exchange special formats across borders.[79]

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[78] Copyright Act, Section 52(1)(zb).

[79] Ti Li Chen, *Copyright Exceptions for Visually Impaired Persons: The WIPO Treaty to Facilitate Access to Published Works by Visually Impaired Persons,* Master's Thesis, Univ. of London (October 29, 2019).

Globally less than 10% of all books are available in one or more accessible formats,[80] and organisations such as the World Blind Union, the World Health Organizations, and the World Intellectual Property Organization all recognize that the percentage in developing countries is far lower.[81] India is home to a significant percentage of the world's disabled, and while estimates vary,[82] there is evidence that people with disabilities comprise between 5 and 8 percent of the Indian population, which amounts to roughly 60 to 96 million persons.[83] Even amongst the visually impaired, it is estimated that of the world's 285 million people with moderate or severe visual impairment,[84] India has about 47 million persons with visual impairment. Of this, only 10% of all blind children get access to education, and the fact that the majority of blind children remain illiterate should be a scandal that shocks the conscience of any democracy that aspires to equality for all citizens.

This problem is further compounded by the fact that very few blind people are able to secure gainful employment, with statistics showing employment for only of blind people in industrial nations being less than half than that of those without visual impairment, and an even lesser number in developing countries.[85] While there are many reasons for these dismal statistics, it is important to approach the problem structurally and understand the relationship

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[80] Examples of accessible formats include braille, audio, large print, computer readable formats such as Microsoft Word, PDF, and HTML.

[81] World Intellectual Property Organization, *Accessible Books Consortium Launched, Joins Effort to End "Book Famine" for People with Print Disabilities,* PR/2014/762 (June 30, 2014).

[82] According to India's National Statistical Office, the total number of disabled population in India was approximately 2.9 crores in 2018 (2.2% of the population), National Statistical Office, NSS Report No. 583 (76/26/1), *Persons With Disabilities in India* (November 23, 2019); *But see* World Health Organization & The World Bank, *World Report on Disability, 2011,* ISBN 978924068800 *(2011).* (It is widely believed that the actual number of persons with disabilities in India is much larger since the World Health Organization estimates that globally, about 1 billion people, or 14% of the population, live with some form of disability, of whom nearly 200 million experience considerable difficulties in functioning.)

[83] Human Development Unit, South Asia Region, The World Bank, *People with Disabilities in India: From Commitments to Outcomes* (July 2009). (It is estimated that 90% of this number live in developing countries).

[84] *See* World Health Organization, *Blindness and Visual Impairment and Blindness,* Fact Sheet (October 13, 2022).

[85] American Federation for the Blind, *Reviewing the Disability Employment Research on People who are Blind or Visually Impaired: Key Takeaways* (2017).

between access, literacy and employment. On this count the dire shortage of books and learning materials or what is sometimes described as the "book famine"[86] can certainly be seen as one of the major contributors to the problem.[87]

The United Nations Convention on the Rights of Persons with Disabilities ("UNCRPD") promotes inclusion and equal accessibility in society as a fundamental human right and rejects the notion that persons with disabilities should have their rights discounted due to ability differences.[88] Under this human rights-based approach, the notion of ability equality is not a privilege, but a human right that the state must help realize.[89] The preamble of the UNCRPD aims at achieving "equalization of opportunities," mainstreaming disability protections for persons requiring intensive support or less support, actively involving persons with disabilities in policy developments, and recognising that action is required to redress past discrimination which has resulted in poverty.[90] India is a signatory to the UNCRPD, 2006[91] and it has also passed various laws that attempt to do away with discrimination against persons with disabilities. If, for a long time, the focus of disability activism was primarily on spatial access and policy reforms that enabled disabled people to participate in public life as full moral citizens, it is with the emergence of computer technology and the possibility of books being available in a digital format that saw the emergence offer global movement

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86 Margot E. Kaminskiand Shlomit Yanisky-Ravid, *The Marrakesh Treaty For Visually Impaired Persons: Why A Treaty Was Preferable To Soft Law,* 75 Univ. of Pitt. L. Rev 259 (2014).

87 F.K. Schroeder, *Ending the Book Famine: Literacy for the Blind without Borders,* 56 Braille Monitor 8 (August/September 2013).

88 A. Lawson, *Accessibility Obligations in the UN Convention on the Rights of Persons with Disabilities: Nyusti and Takacs v Hungary,* 30(2) South African Journal on Human Rights 380 (2014). *See also* United Nations Convention on the Rights of Persons with Disabilities, Views adopted by the Committee at its ninth session, CRPD/C/9/D/1/2010 (April 2013).

89 Arlene S. Kanter, *The Promise and Challenge of the United Nations Convention on the Right of Persons with Disabilities,* 34 Syracuse J. Int'l L. & Com. 287 (2006-2007).

90 United Nations, *Convention on the Rights of Persons with Disabilities,* Preamble (f), (g), (j), (o), (p), (t) and (v) (December 2006).

91 United Nations, *Convention on Rights of Persons with Disabilities,* Art. 30 (3): "State Parties shall take all appropriate steps, in accordance with international law, to ensure that laws protecting intellectual property rights do not constitute an unreasonable or discriminatory barrier to access by persons with disabilities to cultural materials"; European Commission, *Fifth Disability High Level Group Report on the Implementation of the UN Convention on the Rights of Persons with Disabilities,* 214 (May 2012).

articulating the right of disabled people to access learning materials without any hindrance including copyright restrictions.

4.1 Copyright Amendment 2012

The introduction of Section 52(1)(zb) in the Copyright Act is a story that brings together sustained activism, political will and a vision of copyright reform that locates it within an access to knowledge framework. On May 17, 2012, the Indian Parliament introduced a wide range of amendments to the Copyright Act to address a set of long-standing demands by various interest groups including lyric writers, film writers, the software industry and most importantly disability groups who had been advocating necessary changes to the Copyright Act to facilitate easier digitising of books for disabled groups. Section 52(1)(zb) was introduced to permit the conversion of a copyrighted work to any accessible format, so long as the converter operated on a non-profit basis and ensured that converted formats were only accessed by persons with disabilities. In case the conversion and distribution was done for profit, the concerned entity would have to apply for a compulsory license under Section 31(B).[92] The amendment envisaged three broad activities:

a. conversion by a disabled person for his/her own use and for sharing with others in the community;

b. conversions by third parties (individuals or organisations) working for the benefit of the disabled on a non-profit basis;

c. conversions by for profit organisations.

The genesis of the advocacy can be traced back to the year 2003, when a group of committed campaigners advocated for a copyright exception for the disabled.[93] The government responded favourably and proposed an exception, as follows:

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92 The Copyright (Amendment) Act 2012, §31 B.

93 See NUJS-CUSAT Conference, *Copyright Amendments, 2012: A Fair Balance?,* Conference Report (November 2012), p. 42. It is pertinent to note that at that time, the EU already had a progressive Directive (EU Directive 2001/29/EC) that recognized disabled access. The directive permitted use for visually impaired persons which did not conflict with normal exploitation or unreasonably prejudice the legitimate interests of the right holders. According to the EU directive, it is also prohibited to contractually exclude the effectiveness of such authorised use and may not impose additional requirements for the application of the exception.

> *"The following acts would not constitute an infringement of copyright: reproduction, issue of copies or communication to the public of any work in a format, including sign language, specially designed only for the use of persons suffering from a visual, aural or other disability that prevents their enjoyment of such works in their normal format."*[94]

The campaign vociferously protested this woefully inadequate clause which limited the exception to "special formats." In practical terms, this meant that only Braille and sign language would have been permissible under the exception, effectively catering to a very limited segment of the disabled community. The campaign argued that this narrow construction of the exception effectively violated Article 14 of the Indian Constitution which mandates the State not to discriminate between similarly situated class of persons.[95] The government's concern was that the exception could potentially be misused by those who did not have any disabilities. The campaign argued that circumscribing the scope of the exception to "formats specially designed for the disabled" would address this concern, but it would nonetheless seriously prejudice the scope of access for the disabled, as it would mean that only disabled people would be able to convert the books themselves.

The campaign proposed that rather than limiting the types of formats that could be created, the government must limit the "beneficiaries" i.e., any accessible format created under the said exception could be made available only to persons with disabilities. One way of implementing this was by mandating that converters and distributors take "reasonable measures" to ensure that the intended beneficiary belonged to the disabled community by producing certificates issued by doctors attesting to the disability. In any case, even assuming there were mistakes in this verification, the campaign stressed that the potential revenue loss to publishers would be insignificant.

Additionally, it was pointed out to the government that Indian copyright law left the monitoring of infringement to the copyright owner. In the same way, the monitoring of

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94 Copyright Office of India, Response to Comments and Amendments Proposed (2003), 33.

95 Gauri Shankar v. Union of India, 1994 SCC (6) 349, ¶ 7: "Equals should not be treated unlike. Likes should be treated alike."

activities that fell outside the scope of the disability exception ought to be left to the copyright owner.[96] The campaign stressed that the policy option of placing exceptions for disabled users within the realm of compulsory licenses was less desirable than placing it within the realm of Section 52. They contended that the history of the grant of compulsory licenses in India and the function of the copyright board left much to be desired the Copyright Board.[97]

The campaign also highlighted the fact that software and other intellectual property protected tools required to create accessible formats were often expensive and that the amendment ought to ensure their availability at a reasonable cost. It was pointed out that one had to pay a significant sum to avail oneself of the most widely used screen reading software known as Job Access With Speech (JAWS).[98] It was suggested that in order to have an effective exception, content owners that locked up digital content under technology circumvention measures and/or Digital Rights Management (DRM) locks, must be mandated to make available such content to persons with disabilities. In the absence such a provision, the production of talking books or the use of screen reading software for the benefit of the visually impaired would be severely contrained.

The campaign proposed a more liberal and meaningful exception that allow disabled users as well as organizations working on disability to engage in a much wider range of activities including "making of an accessible version of a copyrighted work or the doing of any other act including reproducing, adapting and making available the copyrighted work or accessible version thereof, with the primary objective of enabling persons with visual, aural or other disabilities to access copyrighted works as flexibly and comfortably as persons without such

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96 R.C. Jacob, Sam Taraporevala, and Shamnad Basheer, *The Disability Exception and the Triumph of New Rights Advocacy,* 5 NUJL L. Rev. 603, (2012), 609.

97 This is not merely for uses such as visual disability and for a general overview of the copyright board, see Ananth Padmanabhan, *Copyright Board and Constitutional Infirmities: Failure of the Copyright (Amendment) Act, 2012 and Suggestions for Reforms,* 5 NUJS L. Rev. 703 (2012).

98 See Assistive Labs, *Jaws for Windows, Quick Start Guide* (2018). At the time of this writing the cost of JAWS is $95/year, $90/year for students.

disabilities."[99] The Parliamentary Standing Committee[100] agreed with the arguments put forth by the campaign and observed in its report:

> *"The Committee takes note of the following shortcomings as pointed by the representatives of two organizations working for the disabled: i) Compulsory licensing system as envisaged under §31B would prevent educational institutions, Self Help Groups, other NGOs and reading disabled individuals from undertaking conversion and distribution. ii) The time-consuming and cumbersome procedure for obtaining permissions from Copyright Board. iii) The time involved in subsequent conversions will result in further delays, thereby causing hardships for students. iv) It would discriminate between blind persons knowing Braille and those not knowing it. v) Exception as envisaged under §52(1)(zb) in favour of only 'specially designed' format does not benefit persons affected by cerebral palsy, dyslexia and low vision."*

Consequently, it changed its stands on the question of "special formats" and categorically recommended that conversion to any accessible format ought to be permissible. It concluded:

> *"After analysing the proposed amendments as envisaged in §31B and §52(1)(zb) in the backdrop of interactions held with various stakeholders and the Department, the Committee strongly feels that concerns raised by the organizations working for the disabled are indeed very genuine. The Committee would like to point out that the real objective behind these two provisions is to facilitate the cause of the disabled. Every attempt needs to be made to remove all the drawbacks highlighted in the proposed amendments. The Committee is of the firm opinion that all physically challenged need to be benefitted by the proposed amendments. It would be very discriminating if envisaged benefit remains restricted to only visually impaired, leaving out persons affected by cerebral palsy, dyslexia and low vision. The Committee*

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99 The Disability Exception and the Triumph of New Rights Advocacy, op. cit., 9.

100 Department–Related Parliamentary Standing Committee on Human Resource Development, *Two Hundred Twenty-Seventh Report on Copyright Amendment Bill*, 2010, ¶ 13.3.

takes note of fact that even regular Braille users complement Braille with other accessible formats like audio, reading material with large fonts and electronic texts. The Committee also observes that the modern day Braille production is dependent on the material being first converted into mainstream electronic formats such as MS Word because Braille translation software requires inputs in such formats. The Committee hopes that the request of organisations for extending access of works to all accessible formats instead of special formats presently under consideration of the Department will result in a positive outcome."[101]

Furthermore, the Committee stated that the compulsory licensing provisions should be expanded in order to make it better suited for the needs of disabled sections.[102] Lastly, the Committee took issue with the suggestion that fees should be paid for compulsory licensing conversions. The Committee's attention was drawn to the negative aspects of fees (royalty) likely to be charged for copies going beyond the number of free copies be specified by the Copyright Board. The Committee stated that they were well aware of the fact that most organisations that work on disability do not work the basis of profit and consequently, the imposition of mandatory fees to be paid would serve as a deterrence. The Committee recommended that any organization registered under §12A of the Income-Tax Act, 1961[103] and working primarily for disabled and recognised under the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1958 need not pay any fee and may get a compulsory licence free of charge.[104]

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[101] Id., ¶¶ 13.6 and 13.7.

[102] Id. ¶ 13.7.

[103] Income-Tax Act, 1961, §12A. An organisation registered under this provision is exempted from having to pay income tax.

[104] Id. §13.8.

The representations and subsequent follow up work of the Publication Access Coordination Committee[105] convened by the Xavier's Resource Centre for the Visually Challenged,[106] Alternate Law Forum,[107] Inclusive Planet,[108] and the Center for Internet and Society,[109] stressed the need to incorporate best global practices. A documentary titled "The Blind Act,"[110] highlighted the special needs of persons with disabilities on a broader international canvas. Additionally, the Right to Read Campaign[111] was conducted in India as part of a World Blind Union initiative.[112]

Given that India had signed and ratified the United Nations Convention on the Rights of Persons with Disabilities in 2007, key provisions were highlighted time and again in various representations made by members of the campaign.[113] The Right to Education Act, the Persons with Disabilities Act, 1995, the Universal Declaration of Human Rights, 1948, and the fundamental rights enshrined in the Constitution of India were highlighted for the benefit of the government as well as members of the opposition. The Right to Read Campaign, initiated by the World Blind Union, Sightsavers[114] and other organizations highlighted the value of the ability to read, and the critical difference that it made to the quality of life of a

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105 See Publication Access Coordination Committee, *Response to the Invitation of Views for Changes in the Copyright Act of India, 1957 with Special Reference to Proposed Clause 52(za) Focusing on the Visually Challenged and the Print Disabled* (May 12, 2006). (Convened by the XRCVC, the PACC initially comprised of 7 organizations. It later received multiple support letters in favor of its stand). *See also* Rahul Cherian Jacob, Sam Taraporevala & Shamnad Basheer, *The Disability Exception and the Triumph of New Rights Advocacy,* op. cit., 615.

106 https://www.xrcvc.org/

107 https://altlawforum.org/

108 Information about the Inclusive Planet project is available at https://cis-india.org/research/grants/inclusive-planet (the project is no longer in existence).

109 https://cis-india.org/

110 XRCVC, The Blind Act, Video Documentary (2007).

111 See generally Right to Read Campaign, available at http://www.xrcvc.org/copyright.php

112 See generally *Proposal by Brazil, Ecuador and Paraguay, Relating to Limitations and Exceptions: Treaty Proposed by the World Blind Union (WBU),* SCCR/18/5 (2009).

113 United Nations, *Convention on the Rights of Persons with Disabilities* (2006).

114 https://www.sightsavers.org

human being. It argued persuasively that the denial of access to the printed word amounted to a denial of rights, including those which are economic, social or cultural in nature. The active Right to Read Campaign in India was designed to elicit support for both local and global changes to copyright provisions, which blocked access to works and prevented the overall development of print disabled.[115] The efforts bore significant fruit with the National Human Rights Commission, the lead government agency for the promotion of human rights in India writing in support of the amendment.[116]

4.2 The Marrakesh Treaty

At the global level, one of the most important multilateral treaties that sought to address the question of equitable access for disabled people was the Marrakesh Treaty. This treaty evolved over many years of negotiation and was finally adopted by members of the WIPO on 27 June, 2013. Back in 2004, Chile had proposed that "limitations and exceptions to copyright and related rights"—for the purposes of education, libraries and disabled persons—be put on the SCCR agenda. The issue was noted and then discussed internationally. In 2006, WIPO presented its "Study on Copyright Limitations and Exceptions for the Visually Impaired."[117] In 2009, Brazil, Ecuador and Paraguay proposed the "WIPO Treaty for Improved Access for Blind, Visually Impaired and other Reading Disabled Persons," relating to the limitations and exceptions treaty proposed by the World Blind Union.

Finally, in 2013, WIPO passed the Marrakesh Treaty in order to facilitate access to published works for persons who are blind, visually impaired, or otherwise print-disabled. The Marrakesh Treaty was adopted keeping in mind "the principles of non-discrimination, equal opportunity, accessibility and full and effective participation and inclusion in society, proclaimed in the Universal Declaration of Human Rights and the United Nations

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[115] See generally Mayura Janwalkar, *Free Copyright Control To Help Blind Students*, DNA India (January 6, 2010); Dhavni Solani, *Your Signature Could Help,* Mid-Day (January 19, 2010); Joeanna Rebello Fernandes, *On the Blind Side,* The Times of India (Mumbai) January 31, 2010; Manish Ratan, *Govt. Moves to Relax Copyright Act Lacks Vision,* Mint (New Delhi) (February 3, 2010); Mayura Janwalkar, *World Wide Web at the Fingertips of the Visually Challenged*, DNA (Mumbai) (April 20, 2010).

[116] Further information available at http://nhrc.nic.in.

[117] Judith Sullivan, *Study on Copyright Limitations and Exceptions for the Visually Impaired,* SCCR/15/7, WIPO (2007).

Convention on the Rights of Persons with Disabilities."[118] The Treaty required the deposit of 20 instruments of ratification or accession from the eligible parties before coming into force.[119] The treaty came into force on September 30, 2016, and India was the first country to ratify it on 24 June 2014.[120]

The main aim of the Marrakesh Treaty is to enhance the right to read for persons with visual impairments, and, towards this end, the Treaty allow signatory states to create exceptions and limitations within copyright law to allow for forms of usage that enable greater access for people with disabilities.[121] Accordingly, under the Treaty, signatories are mandated to adopt copyright exceptions for non-profit creation and distribution of accessible versions of works for persons with visual impairments.[122] The Marrakesh Treaty is remarkable insofar as it mandates, rather than merely permit, exceptions to copyright's exclusive rights.

This marks a significant departure from the usual approach where exceptions and limitations would be see as defensive measures designed to protect users from claims of infringement by copyright owners, and instead inaugurates a positive rights framework that looks at exceptions and limitations not merely as legal defences but as positive rights granted to classes of users. The Treaty also contains provisions facilitating the international exchange of books and publications in accessible formats, requiring WIPO to establish information sharing procedures to enhance cooperation between member states, and mandating that states allow circumvention of digital locks placed on e-books and other works.[123]

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[118] See Preamble of *Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled* (2013).

[119] In addition to Member States of WIPO, any intergovernmental organization and the European Union may also become party in accordance with Article 15 of the Marrakesh Treaty.

[120] WIPO, Marrakesh Notification No. 1 (June 24, 2014).

[121] Jingyi Li, *Reconciling the Enforcement of Copyright with the Upholding of Human Rights: A Consideration of the Marrakesh Treaty to Facilitate Access to Published Works for the Blind, Visually Impaired and Print Disabled,* 36(10) European Intellectual Property Review 653 (2014).

[122] Marrakesh Treaty, Article. 4.

[123] Marrakesh Treaty, Articles 5, 6, 7 and 9.

One significant aspect of the Marrakesh Treaty is the fact that it defines who visually impaired person are in a slightly wider manner. Under the treaty the definition it is not just visually impaired persons, but also people who experience other difficulties when accessing works in traditional ways—such as in print—who may be termed "reading-disabled." This is extremely significant given that a large number of people with visual disability were not born with visual disability but became visually disabled as a result of age, and in that sense it is useful to recall, when thinking of copyright exceptions, that many of us are only temporarily abled, and it is a fact of life that almost everybody will become visually disabled at some point of time.

It is vital that we at least develop a long-term direction within copyright policy. Section 52(1)(zb) is a major step in that direction but progressive laws and policies without follow-up action from beneficiaries and other players, would be superfluous. If the visual disability exception is to exist not merely on paper, but also in practice, what it would entail are massive projects to digitise public libraries across the country and make them available for the print disabled.

5. The Library and Archives Exception

5.1 The Five Laws of the Library

Libraries and librarians are perfectly poised to serve as the ultimate arbiters of the principle of balance and public good within copyright law. With their commitment to preserving and disseminating books, they serve as natural allies of the rights and interest of authors, while at the same time, their belief that these interests are best served when books are actually read by readers ensures that they are opposed to any system that locks up knowledge to the detriment of readers. As institutions, libraries have played a central role in foregrounding the importance of knowledge within an idea of a shared, communal life, and in that sense they have been accurately characterised as "legitimate proxies for the public interest."[124]

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[124] Michelle M. Wu, Section 1 ("History of Libraries: Service to the Public Interest") in *Rebalancing Copyright: Considering Technology's Impact on Libraries and the Public Interest,* AALL Publications Series No. 85, William S. Hein & Co. (2021) at 40.

Libraries are among the few institutions whose core operating principles do not involve an element of self-interest; rather they exist to make information accessible to the public. There is a deeply egalitarian spirit that serves as the ethical bedrock upon which the institution of public libraries are founded, and this egalitarian instinct translates itself into a principled belief that knowledge cannot be and should not be limited only to those who can afford it.[125] As public institutions that serve a public good, it is not surprising that libraries have also led the way in authoring their own set of ethical principles (interestingly called "laws of library science").

Even if they are not laws in the formal legal sense of the word,[126] in that they are not creatures of legislative acts, it is important nonetheless for us to recall these code of ethics which emerge from one of the primary constituencies affected by copyright law and policy. In 1927 S.R. Ranganathan, a mathematician turned librarian, often regarded as the "father of Indian library movement," outlined his plans for an extensive interconnected rural library system at the Fifth All-India Library Conference hosted by the Madras Library Association, which became the blueprint for rural library services in the region.[127] He also formulated five laws, and these Five Laws of Library Science are perhaps the first thing that any student of library science in India encounters, and it is impressive to see how prescient the five laws were in anticipating some of the contemporary concerns raised by the access to knowledge movement.[128]

1) Books are for use. Ranganathan postulates this law in opposition to the then prevailing philosophy that libraries are primarily meant for the "preservation" of books even if it meant

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[125] Ibid.

[126] The journalist John Austin distinguished laws that are properly called from those which are improperly called and those which are only called laws through analogy. Thus, for Austin, laws passed by the legislature are laws properly called, religious laws are laws which are improperly called laws, and laws of nature are only laws through analogy. Representative of the modernist instinct works absolute bifurcations between realms of law, morals and natural phenomena, this perspective has subsequently been rejected by schools of jurisprudence which argue for a more fluid relationship between the domains of law, morality and custom. See John Austin, *The Province of Jurisprudence Determined* (Second Ed.), John Murray (1861).

[127] Murari Lal Nagar, *Indian Library Scene As Seen at the Dawn of Independence,* International Library Center (1987).

[128] S. R. Ranganathan, *Five Laws of Library Science,* Asia Publishing House (1931).

barring access to them from the very people who sought them. He advocated a recognition of users' rights to free and unhampered use of books, and observed that policies related to libraries including the location of the library, the hours it was open to the public, the architecture of the library itself and the skill of its staff all potentially contributed to or interfered with the realization of this law's goals.

2) Books are for all. This law postulates that the rights of every class of users should be recognized equally irrespective of age, gender, class, location/distance or disability. Ranganathan belief that "Books are for all" would have to be reflected in the location of the library, the selection of books, in the funding for special rural outreach programs, selection of library staff, design of the library interiors et cetera. This principle would ensure that every reader has access to their specific book requirements. It casts a responsibility on librarians to be aware of the demands of the readers/users and respond to the same actively. It also cast an additional burden on librarians to reach out to those who would normally be unable to access libraries like the ailing, prisoners, et cetera.

3) To every book its reader. This law postulates that every book has its own unique reader and librarians must take all necessary steps to ensure that the book finds its reader. Ranganathan conceives of the librarian as a salesman of the idea of reading and considers it his duty to increase the market for books through his efforts such as appropriate arrangements of book shelves, organizing of book-readings and lectures or performances.

4) Save the time of the reader. This law makes it mandatory to adopt institutional policies and administrative procedures that save the time of the reader. It is relevant to note that this included the adoption of an open-access system where readers could freely browse books placed on shelves as opposed to ordering them from a catalogue; the adoption of classification and cataloguing systems that would make it easy for readers to locate books on shelves etc. The fundamental principle would have to be the convenience of the reader over administrative convenience.

5) The library is a growing organism. The last of Ranganathan's laws entails that libraries should be designed to allow them to grow since "an organism that ceases to grow will petrify

and perish." In today's language, the library including its administrative policies must be kept "open source" to accommodate emergent uses.

These five laws, drafted by a librarian, gain even more significance in our times and the question to be asked is how these fundamental principles get reflected in the copyright exceptions for libraries particularly as they transition into digital libraries. It could be argued that Ranaganathan prophetically anticipated and predicted the founding principles of the Internet itself while formulating the Five Laws of Library Science.[129] While the move from a paper based library to digital libraries should, in principle, make it easier to achieve the goals set by Ranaganathan, this is often not the case and one of the impediments exists in the form of stringent copyright laws that hinder, rather than facilitate access. In this light, it becomes vital that we understand and interpret the library exceptions in conversation with the normative standards set by the five laws of library science.

In the absence of judicial precedents in the area, it is imperative that we turn to a wide range of normative sources that assist us with our interpretation of the provision.[130] It is a common doctrine of statutory interpretation that while interpreting conventions that emerge from particular practices, the best interpretative approach to the practice is to first and foremost look at the internal integrity and logic of the practice.[131] Thus for instance, while considering what the terms "storage" and "preservation"[132] would mean for a library, it is imperative that

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[129] Iyengar, P., *Public Libraries and Access to Knowledge (A2K): A History of Open Access (OA) and the Internet in India in the 19th and 20th Century* in *Access to Knowledge in India,* Bloomsbury Academic (2009).

[130] In Robert Cover's famous article *Foreword: Nomos and Narrative*, 97 Harv L. Rev. 4 (1983), he argues that law is simultaneously capable of generating normative words even as it is capable of destroying them. It is "jurisgenerative" when it expands the normative horizons of the world by being open to the diversity of sources of norms, and it becomes "jurispathic" when it subsumes the diversity of norms under the uni-dimensional and totalising ideal of legal normativity. Translated into the realm of copyright law, one could argue that an interpretation of fair use that is open to the normative claims made by primary actors in the realm of copyright such as librarians would be an example of the jurisgenerative possibilities within copyright.

[131] *See, e.g.,* Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to be Construed,* 3 Vand L. Rev. 395 (1950), 401-406.

[132] Section 52(1)(n) allows for "the storing of a work in any medium by electronic means by a non-commercial public library, for preservation if the library already possesses a non-digital copy of the work."

we locate the operation of these technical terms within the internal logic of the standard practices of libraries. In this regard, it would be useful for us to turn to the five laws of library science as a way of identifying the core purpose of a library. Ranganathan's law that "books are for use" advocates that books must be available for use to all in an unhampered way, and preservation and storage should be interpreted keeping the utility of the books in mind.

If preservation and storage were an end in themselves, it would produce a paradoxical result where preservation and storage itself comes in to loggerheads with the ultimate goal of making sure that books are used by readers. Ranganathan's law that a "library is a growing organism" supports a liberal interpretation of the library exception, one that takes into account technological advancements that facilitate libraries to work more efficiently for readers. Consider for instance one form of use by libraries that have been rendered possible only as a result of digital technologies, namely document delivery service. As physical objects, Library materials are limited by physical space, but it is relatively common for libraries to exchange materials with each other by scanning a portion of the original and supplying the same to other libraries that do not have a physical copy of the book or indeed access to the book.

The legality of this practice was examined by the Supreme Court of Canada in CCH Canadian v. Law Society of Upper Canada with the court confirming that document delivery services do not constitute a "communication to the public."[133] This interpretation by the court is consistent with the internal logic of libraries as reflected in Ranganathan's laws that "books are for use" and "save the time of the reader."

5.2 Lending of Books & Exhaustion Principle

Lending by libraries, the sale of second-hand books and parallel importation, all function and exist on the principle of exhaustion. Simply stated, this principle works on the premise that certain rights of copyright owners are exhausted once a sale has come into effect of a work. It is particularly invoked in instances such as the reselling of books or the lending of books after they have been legitimately purchased by a buyer or a library. This principle finds

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[133] CCH Canadian Ltd. v. Law Society of Upper Canada, 2004 SCC 13, Supreme Court of Canada (March 4, 2004) ¶ 64, 78. This case is discussed at greater length in Section 7, the research exception.

expression in section 14 of the Copyright Act which defines the meaning of copyright in different classes of works, and in the case of literary, artistic or dramatic works, the provision grants an exclusive right to copyright owners "to issue copies of the work to the public not being copies already in circulation."[134] The phrase "not being copies already in circulation" includes within its ambit works that have already been sold, and the exclusive right to issue copies of the work to the public are accordingly exhausted.

The principle of exhaustion originates from common law principles. In Kirtsaeng v. John Wiley & Sons, the U.S. Supreme Court referred to a 17th century treatise by Lord Coke where he proposed that a seller of a chattel would not be allowed to control its subsequent alienation by the buyer as such restraint would be "against trade and traffic, and bargaining and contracting between man and man."[135] Here, the court emphasised the autonomy of the purchaser to decide the means to resell or dispose of the property. This principle also finds place in Sections 10 and 11 of the Indian Transfer of Property Act, 1882.[136]

In copyright law, the principle of exhaustion finds early articulation in Bobbs-Merrill Co. v. Strauss,[137] a case in which a publisher had sold copies for a reduced price to wholesalers and bookstores but placed a notice inside the books stating that the copies should not be distributed for less than a dollar. The Supreme Court asked whether the phrase "the sole right of vending the same" as provided in the statute, implies that the copyright owner can restrict

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134 Section 14(a)(ii).

135 Kirtsaeng v. John Wiley & Sons, Inc., 568 U.S. 519 (2013), at 17, citing 1 E. Coke, *Institutes of the Laws of England* (1628), § 360, p. 223.

136 Indian Transfer of Property Act, 1882. Section 10 states: "Where property is transferred subject to a condition or limitation absolutely restraining the transferee or any person claiming under him from parting with or disposing of his interest in the property, the condition or limitation is void, except in the case of a lease where the condition is for the benefit of the lessor or those claiming under him." Similarly, Section 11 states: "Where, on a transfer of property, an interest therein is created absolutely in favour of any person, but the terms of the transfer direct that such interest shall be applied or enjoyed by him in a particular manner, he shall be entitled to receive and dispose of such interest as if there were no such direction."

137 Bobbs-Merrill Co. v. Strauss, 210 U.S. 339 (1908).

the subsequent alienation of the copyrighted work through a notice in the book alleging that a sale at a different price would be treated as an infringement.[138]

The court held against the copyright owner and stated that copyright law does not allow the owner of the copyright to impose, by such notice, any limitation on the future sale of such copy by a lawful purchaser. The court pertinently observed that on an interpretation of the statute, the resale does not interfere with the copyright owner's right to multiply and sell her work. This principle was later codified as Section 109(a) of the U.S. Copyright Act which provides that, notwithstanding the copyright owner's public distribution right under Section 106(3), "the owner of a particular copy or phonorecord lawfully made under this title, or any person authorized by such owner, is entitled, without the authority of the copyright owner, to sell or otherwise dispose of the possession of that copy or phonorecord."[139]

Section 14 of the Indian Copyright Act, 1957 defines the term "copyright" as "the exclusive right subject to the provisions of this Act, to do or authorise the doing of any of the following acts in respect of a work or any substantial part thereof."[140] Further, Section 14(a) categorically states that in the case of a literary work copyright subsists with the owner "(i) to reproduce the work in any material form including the storing of it in any medium by electronic means; (ii) to issue copies of the work to the public not being copies already in circulation; Section 14(a)(ii) was introduced by way of the 1994 amendment to the Copyright Act and the word "publish" was replaced with "to issue copies of the work to the public not being copies already in circulation."[141] Thus, Section 14(a)(ii) appears to manifest the legislative intent to apply the principle of exhaustion. This is made clear by the explanation to Section 14 of the Act, which states: "For the purposes of this section, a copy which has been sold once shall be deemed to be a copy already in circulation."[142]

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138 Id. at 350.

139 17 U.S.C. 109(a) ("Limitations on exclusive rights: Effect of transfer of particular copy or phonorecord").

140 The Copyright Act (1957), Section 14.

141 The Copyright (Amendment) Act, 1994, Gazette of India (Extraordinary), Part II-Section 1, June 9, 1994.

142 Id.

Exhaustion is generally of three kinds: national exhaustion, international exhaustion and regional exhaustion. National exhaustion refers to the principle that once a copyright owner has authorized the distribution of a copy of their work within a particular country, they cannot prevent further distribution of that copy within that country. This means that the copyright owner's control over the distribution of their work is exhausted at the national level. International exhaustion, on the other hand, refers to the principle that once a copyright owner has authorized the distribution of a copy of their work anywhere in the world, they cannot prevent further distribution of that copy anywhere else in the world. This means that the copyright owner's control over the distribution of their work is exhausted at the international level. The main difference between the two concepts is the scope of the exhaustion. National exhaustion applies only within a particular country, while international exhaustion applies globally.

Traditionally, it was assumed that India follows a principle of national exhaustion.[143] Copyright scholars have however argued that there is no consistency amongst different legal judgments on the issue, and there is reasonable ground to argue that India follows international exhaustion.[144] This debate has been most pertinent in the realm of "parallel imports" (the importation of legitimately obtained copies of a copyrighted work from a country where they were initially sold into another country).

It is pertinent to note that in 2010, the government of India proposed to amend Section 2(m) of the Copyright Act, to clarify the situation regarding "parallel importation" in India. Consequently, the Copyright Amendment Bill, 2010 in its first version, added the following proviso to Section 2(m): "provided that a copy of a work published in any country outside India with the permission of the author of the work and imported from that country shall not

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[143] That bias towards a principle of national exhaustion has perhaps changed as India takes a visible role in international forums, as well as the Delhi High Court's observations in cases such as Warner Brothers v. Santosh V. G. discussed shortly. For a fuller discussion, see Pranesh Prakash, *Exhaustion: Imports, Exports and the Doctrine of First Sale in Indian Copyright Law*, Manupatra Intellectual Property Reports (February 2011).

[144] Ibid. *See also* Raman Mittal, *Whether Indian Law Allows Parallel Imports of Copyrighted Works: An Investigation,* 55 Journal of the Indian Law Institute 504 (2013).

be deemed to be an infringing copy."[145] This proviso sought to legalize parallel importation and adopt international exhaustion. This implies that third parties who lawfully acquired copies of copyrighted works in a foreign country could import such copies into India and such act of importation would be exempt from infringement.[146] However, publishers vehemently opposed this amendment on the ground that it would unleash "anarchy" in the book market and harm the publishers and the proviso was eventually not added to Section 2 (m).[147] The principle of exhaustion was examined by the Delhi High Court in Warner Bros. Entertainment Inc. v. Santosh V. G.[148] where the issue pertained to copyright in a cinematograph film, and Section 14(d)(ii) of the Copyright Act, before it was amended in 2012,[149] came up for consideration. The said section, prior to being amended in 2012, read as follows:

> *"14. Meaning of Copyright.--For the purposes of this Act, "copyright" means the exclusive right subject to the provisions of this Act, to do or authorise the doing of any of the following acts in respect of a work or any substantial part thereof, namely xxx xxx xxx (d) in the case of a cinematograph film,-- xxx xxx xxx (ii) to sell or give on hire or offer for sale or hire, any copy of the film, regardless of whether such copy has been sold or given on hire on earlier occasion."*

The court in this case, deliberating upon the principle of exhaustion, concluded as follows:

> *"The doctrine of exhaustion of copyright enables free trade in material objects on which copies of protected works have been fixed and put into*

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145 The Copyright (Amendment) Bill, 2010, Bill No. XXIV of 2010.

146 Shamnad Basheer, Debanshu Khettry, Shambo Nandy and Sree Mitra, *Exhausting Copyrights and Promoting Access to Education: An Empirical Take,* J. of Intellectual Property Rights, Vol 17, 335-347 (2010).

147 Department–Related Parliamentary Standing Committee on Human Resource Development, Two Hundred Twenty-Seventh Report on Copyright Amendment Bill, 2010.

148 Warner Bros. Entertainment Inc. v. Santosh V. G., CS (OS) No. 1682/2006 (2009).

149 The Copyright Amendment Act, 2012, Gazette of India, 04/0007/2003-12 (June 8, 2012).

> *circulation with the right holder's consent. The "exhaustion" principle in a sense arbitrates the conflict between the right to own a copy of a work and the author's right to control the distribution of copies. Exhaustion is decisive with respect to the priority of ownership and the freedom to trade in material carriers on the condition that a copy has been legally brought into trading. Transfer of ownership of a carrier with a copy of a work fixed on it makes it impossible for the owner to derive further benefits from the exploitation of a copy that was traded with his consent. The exhaustion principle is thus termed legitimate by reason of the profits earned for the ownership transfer, which should be satisfactory to the author if the work is not being exploited in a different exploitation field.*[150]

Thus, the wording of Section 14(a)(ii) of the Copyright Act and the reasoning of the court in Santosh V. G. seems to suggest that it was the intention of the legislature to ensure that principle of exhaustion is applicable to literary works and implies that though the right to distribute a work may subsist with the copyright owner, this right will only apply to the extent that such copies are not copies already in circulation. To put it simply, a copyright owner will control the distribution of only those copies of a literary work which have not already been lawfully sold with her permission to another entity and are essentially new "reproductions" for the market. This principle was also affirmed in Rameshwari Photocopy Services.

In Théberge v. Galerie d'Art du Petit Champlain Inc., et al, the Supreme Court of Canada took a similar position against monopolistic control by copyright owners, as the court noted that in economic terms it would be equally inefficient to overcompensate creators for the right of reproduction as it would be "self-defeating" to under-compensate them. Thus, the court held that once an authorized copy of a work is lawfully sold to a person, it is for the buyer to determine what happens to such copy. The court also noted that excessive control by holders of copyrights and other forms of intellectual property may unduly limit the ability of

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150 Warner Bros. Entertainment Inc. v. Santosh V. G., ¶ 57.

the public domain to incorporate and embellish creative innovation in the long-term interests of society as a whole or create practical obstacles to proper utilization.[151]

In a paper-only world, the principle of exhaustion covers the resale or the lending of a book after its purchase by library. New models of lending have been facilitated by the development of digital technologies. For instance, in recent times, a range of innovative library practices have emerged to address the dire gap between demand and supply of books. One such innovation involves the question of whether a library can, after digitising of copy of a book that it owns, lend a digital copy on terms which are similar to how a physical copy of the book would be lent. If the principle of exhaustion in the case of lending is justified on the grounds that the seller's rights issue copies are exhausted, it stands to reason that the same principle applies when the lender chooses to lend the digital as opposed to a physical copy of the book.

If a lender simultaneously lends both the physical and digital copy of the book, then perhaps the principle of exhaustion would not save such forms of lending. If on the other hand, the lender incorporates a mechanism that treats the digital copy of the book with a principle of equivalence, and imposes restrictions on the ability to lend the digital book when it is already borrowed by reader, it appears churlish to treat the two users as being different in degree and in kind.

5.3 Controlled Lending in Digital Formats

This mode of lending, sometimes referred to as Controlled digital lending ("CDL"), is a term that reflects the emerging and already wide-spread practice that enables a library to circulate a digitized title in place of a physical one, using a link by which the user can access a digitally controlled reproduction for a limited time, and then returning it for others to enjoy, no different than circulating and returning a physical book. CDL permits lending of only the number of copies that the library owned before digitization.[152]

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[151] Théberge v. Galerie d'Art du Petit Champlain, et al., 2002 SCC 34 (Supreme Court of Canada), ¶ 32.

[152] David R. Hansen and Kyle K. Courtney, "A White Paper on Controlled Digital Lending of Library Books," Harvard Library, Office for Scholarly Communications, DOI 10.31228/osf.io/7fdyr (2018).

For example, a library that owns three print copies of a title may digitize one copy and use CDL to lend that digital copy and only two of the three print copies. Alternatively, it may lend three digital copies, or two digital copies and one print. When the library lends a digital copy, it is prohibited from lending the physical one. CDL is an emerging innovation that enables the library to lend digital editions to users in remote locations who are unable to borrow the print, facilitates access to library resources for readers with disabilities or physical access limitations, thus advancing the library's public interest mission. Returning to Ranganathan's laws of the library as a normative aid for the interpretation of copyright provisions, one could argue that such forms of lending are absolutely consistent with the public spirited interpretation of what the purpose of a library is, and how the exhaustion doctrine can be interpreted for copies of books possessed by libraries. Indeed, the practice is based on the age-old practice of libraries of once they acquire a book, they maintain the book. In prior days, that might be rebinding the book. Today, that might mean scanning the book. In either case, the book was properly acquired, and is being properly lent.

The legality of control digital lending as practiced by the Internet Archive was recently examined by a United States District Court of the Southern District of New York. In Hachette Book Group, Inc. v. Internet Archive,[153] Hachette and 3 other major publishers filed a lawsuit against the Internet Archive, a non-profit digital library that provides access to millions of free books, websites, and other digital materials. The lawsuit claimed that the Internet Archive's "Open Library" and "National Emergency Library" projects, which involve scanning and providing digital copies of copyrighted books, constituted copyright infringement. The Internet Archive made these books available for lending to all registered users on a global basis. In the case of the long-standing Open Library program, this lending was based on an own-to-loan ratio, lending out a single digital copy corresponding to a single physical book to one reader at a time. In the case of the National Emergency Library, which ran for 2 months at the outset of the COVID lockdowns, the own-to-loan was lifted as almost all libraries were closed.

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153 Hachette Book Group, Inc. v. Internet Archive, 542 F.Supp. 1156 (2023).

The publishers argued that these actions caused significant harm to their businesses by resulting in lost potential sales and licensing revenue from copyrighted works. They sought damages and an injunction to stop the Internet Archive from continuing to provide access to their copyrighted materials without permission. In response, the Internet Archive argued that its actions fell under the “fair use” exception to copyright law. The organization contended that its efforts to provide access to knowledge and preserve digital content for future generations were consistent with the goals of copyright law. The Internet Archive stated that it did not make its ebook copies of copyright-protected works available for mass download and that it actually performed the traditional functions of a library by lending limited numbers of a work through controlled digital lending. An important aspect of this claim was the fact that the Internet Archive lent out books digitally strictly on the basis of an “own to loan ratio” under which a library can only lend out as many copies that it has legally acquired. For example, if a library owns three copies of an open book, then even after digitization, a library will be able, at any given time, to loan only a maximum of three copies of the book whether in physical or digital form.

In the summary judgment by the district court in the Hatchette case, the Internet Archive's controlled digital lending was deemed not to be transformative, unlike previous fair use cases involving the digitization of large quantities of books such as the HathiTrust and Google Books case. HathiTrust had created a full-text searchable database, which allowed users to easily access the information they were searching for. Similarly, Google Books had created a database with a snippet view search function, which allowed users to preview a small portion of the book before deciding whether to purchase it or not. In both cases, the court found the use of copyright to be consistent with the use exceptions, and in particular held that there was sufficient transformative authorship for it be considered fair use. By contrast, the court found that CDL did not add any new value to the original works, nor did it offer users the ability to view any portion of the books they were searching for, making it not transformative. As a result, the court held that each fair use factor favored the Publishers, and rejected IA's fair use defense that lawfully acquiring a copyrighted print book entitled the recipient to make a copy and distribute it.

This is not however the last word on the matter as the case is under appeal. There are however flaws and shortcomings in the reasoning of the District Court, many of which will no doubt invite examination by the U.S. Court of Appeals. The court's dismissal of the public benefit argument without considering it in greater detail is problematic as it fails to recognize the broader societal benefits that may result from increased access to information and culture. This narrow focus on market harm disregards the public interest and the broader goals of copyright law.

If we examine the judgement from an Indian perspective, what is immediately striking is the rather limited understanding of transformative use that the court has. The court seems to rely on the theory of transformation that only stems from a deeply internal perspective that privileges the authorial act of creativity and the idea of the original work. In the Indian context, there is a much broader understanding of transformative value which is cognizant of transformation not merely as an attribute of creativity, but equally of access and equity. In this context, it might be worth distinguishing even at the level of terminology, what it is that Indian law allows. The much wider range of exceptions and limitations in Indian law demands that we locate the act of digitisation within the logic of the personal use exception, the disability exception, the educational exception, and the library exception in Indian copyright law. It is our contention that all three of these forms of controlled lending are allowed by fair use in India and can be mapped onto the specific exceptions that we have been examining.

The Hatchette case must be treated with care as it is a lower court decision based on U.S. law. It is instructive to see how this issue was treated in other jurisdictions, where totally opposite conclusions were reached and at much higher levels in the judicial hierarchy. In the European Union, the Rechtbank Den Haag (the District Court in the The Hague, the Netherlands) requested a preliminary ruling from the EU Court of Justice on whether a digital copy of a printed book, which was lawfully acquired, could be lent to patrons.[154] The court ruled that "lending" was permitted and "covers the lending covers the lending of a digital copy of a book, where that lending is carried out by placing that copy on the server of a public library

[154] Vereniging Openbare Bibliotheken v. Stiching Leenrecht, European Union Court of Justice (Third Chamber), C-174/15 (November 16, 2016).

and allowing the user concerned to reproduce that copy by downloading it onto his own computer, bearing in mind that only one copy may be downloaded during the lending period and that, after that period has expired, the downloaded copy can no longer be used by that user."[155]

The Opinion of the Advocate General in the EU Court of Justice in this case argued strongly (and successfully) for preserving and enhancing the role of libraries in the European Union:

> *"Libraries are one of civilisation's most ancient institutions, predating by several centuries the invention of paper and the emergence of books as we know them today. In the 15th century, they successfully adapted to, and benefited from, the invention of printing and it was to the libraries that the law of copyright, which emerged in the 18th century, had to adjust. Today we are witnessing a new, digital revolution, and one may wonder whether libraries will be able to survive this new shift in circumstances. Without wishing to overstate its importance, the present case undeniably offers the Court a real opportunity to help libraries not only to survive, but also to flourish."*[156]

As we examine the issues in controlled digital lending, it is important to do so within the context of Indian Law, and to remember that even under the auspices of international treaties, the law in the United States, the United Kingdom, the European Union, and India have all adapted to meet the particular requirements of their respective jurisdictions. In particular, the "fair use" analysis that the U.S. has adopted has not found favor in the UK, Europe, and India and instead the law has been based on the concepts of limitations and exceptions.[157]

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[155] id. at ¶ 54.

[156] *Opinion of Advocate General Szpunar,* Vereniging Openbare Bibliotheken v. Stichting Leenrecht, Case C-174/15, European Union Court of Justice (June 16, 2016).

[157] A definitive history of the development of these different outlooks and outcomes in the history of intellectual property law can be found in Peter Baldwin, *The Copyright Wars: Three Centuries of Trans-Atlantic Battle,* Princeton University Press (2014).

5.4 Library Exceptions in the Indian Copyright Act

The copyright act contains three exceptions specific to libraries and archives. Section 52(1)(n) allows for "the storing of a work in any medium by electronic means by a non-commercial public library, for preservation if the library already possesses a non-digital copy of the work"; Section 52(1)(o) provides for "the making of not more than three copies of a book (including a pamphlet, sheet of music, map, chart or plan) by or under the direction of the person in charge of a non-commercial public library for the use of the library if such book is not available for sale in India"; Section 52(1)(p) permits "the reproduction, for the purpose of research or private study, or with a view to publication, of an unpublished literary, dramatic or musical works kept in a library, museum or other institution to which the public has access."

Section 52(1)(n) was introduced by way of the 2012 amendment to the Copyright Act. This is the only library exception that applies to any kind of work, i.e., literary, dramatic, musical, or artistic works or films or sound recordings. The precondition is that the library should possess a non-digital copy. The provision addresses the need of digital backups and archiving by libraries and is premised on the recognition of two central ideas, the fragility of paper and arguably, the principle of exhaustion. Every library is haunted by the founding myth of all libraries—the burning of the library of Alexandria. Libraries are particularly susceptible to the elements, changing seasons, and insects.[158] The possibility of digitally preserving and storing books thus appears to be a boon for libraries who have spent a lot of money, labour and infrastructure in creating a library, but perpetually endangered by the possibility of its destruction.

The provision clearly allows for the creation of digital backups where the library is already in possession of a physical copy, but the question that immediately arises is what is the purpose of creating backups, and is there a difference between archival functions and library functions? The provision uses the word preservation but is silent with regard to whether the

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[158] *See* Andrew Pettegree and Arthur der Weduwen, *The Library: A Fragile History,* Basic Books (2021). For a list of libraries destroyed by fire see Wikipedia, *List of Destroyed Libraries. See also* Richard Oveden, *Burning the Books: A History of the Deliberate Destruction of Knowledge,* Harvard University Press (2022).

library can use the preserved copy in any manner? Can a library take a printout of the book from the digital copy and lend it while keeping the original as a reference book? Could the library lend a photocopy of the book in addition to the original book? Can libraries create an efficient search engine that allow for the possibility of searching through the full text of the digitised books? Can libraries enable readers to read digital copies of these books on machines within the library? Can libraries replicate a digital lending system that operates on the same principles as the lending of physical copies of the books do? What will the purpose of preservation by itself mean for a library, when libraries, unlike archives, are defined not in terms of preservation alone, but by circulation as well?

It is in the context of questions such as these that it becomes important to clarify the scope of Section 52(1)(n). Consider for instance the following two scenarios. In the first scenario if we were to assume the library had a copy of book X, and they had created digital backup of this book and the physical copy of this book were destroyed, what purpose would the digital backup serve in terms of the institutional aims and goals of the library? What use would the digital copy be for the library and indeed for the reader if the digital copy could not be used in any way other than merely as a preserved copy? Our second scenario is an even more drastic one: let us assume that the same night a library had created a digital backup of all of books, in a rather dire turn of events, the entire collection of the library is destroyed in an unfortunate fire. Will the library be entitled to use its digital backup in any way? Could this be in the form of the recreation of the library printouts of the books that were destroyed, or could it be through the creation of a digital library that follows the same rules and constraints that would be placed on a physical library? Can the digital copy of a book be treated as a fungible version of the physical book?

In light of these questions, what is the interpretation that can be given to the word preservation in Section 52(1)(n) to enable it to facilitate optimum use by a library? While a narrow reading of the word would enable a library to perform the functions of an archive, the question that arises is whether the Parliament intended for the library exception to be treated merely as an archival exception, a form of write-only memory? As we have established, the main purpose and objective of libraries is to facilitate access to knowledge. We propose that there is a procedural and substantive dimension within Section 52(1)(n). The substantive

content of the provision is to facilitate a library achieving its function serving public interest and the general good, and the procedure that the Copyright Act envisages through which this purpose can be served is by allowing for digital storage.

This purposive approach towards the reading of the section is further buttressed by the fact that the provision is absolutely clear that it is only applicable to a very narrow class of libraries, namely non-commercial, public libraries. The principle of utility is further underlined in Section 52(1)(p) which allows for the reproduction of unpublished literary, dramatic or musical works for the purpose of research or private study, if kept in the library, museum or other institution to which the public has access.

The reference to "research or private study" recalls for us a general exception that already exists in Section 52(1)(a) of the act. This provision already provides for a wide encompassing exception created entirely from the perspective of the user but its explicit repetition within Section 52(1)(p) unites two strands within Section 52. It brings together institutional exceptions (for libraries) along with individual exceptions, and it is important to note that there are two very different forms of usage that have been envisaged. While 52(1)(a) envisages individual uses including research, in 52(1)(p) encompasses the individual user as well as the library as it is specifically meant for the publishing of materials that are unpublished or out of print. It has to satisfy the following conditions:

a. It is applicable for reproduction,
b. for the purpose of research or private study,
c. or with a view to publication,
d. of an unpublished literary, dramatic or musical works kept in a library, museum or other institution to which the public has access.

It is significant to note that the Rajya Sabha prior to voting on the Copyright (Amendment) Bill, 1982 on August 4, 1983 proposed to insert a provision in the Copyright Act for publication of unpublished works of Indian authors who are either unknown or dead or not traceable. The intention of the legislature was to ensure the availability of such works to the public and facilitate access to the same while maintaining quality of the same. Thus, the role

of library as envisaged here by the legislature is to preserve such unpublished works so that eventually it can make the same available to the public.

Finally, we turn to Section 52(1)(o)[159] of the Copyright Act, 1957 which permits non-commercial public libraries to make up to three copies of books not available for sale in India for use by the library and such copying would not amount to copyright infringement. The word "public library" in this clause was substituted with "non-commercial public library" by way of the 2012 amendment. It is pertinent to note that the Explanation to Section 2(1)(fa)[160] as amended by the 2012 Copyright (Amendment) Act provides that libraries and educational institutions will have non-profit status where they receive grants from the state or are exempted from paying tax in terms of the Income Tax Act, 1961.[161]

Iyengar shows that even though the term "Public Libraries" has not been defined in the Copyright Act, the same term can be found in various state legislations on public libraries. We can also we apply a common law understanding to define "public libraries" in terms similar to, "public authorities" under the Right to Information Act, which would include any "body owned, controlled or substantially financed; (ii) non-Government organisation substantially financed, directly or indirectly by funds provided by the appropriate Government."[162] Thus defined, a "public library" would include any library receiving public funds. This would be in line with the language of various international copyright statutes. For instance, the Library Exception in Australia extends coverage to libraries that are "not for profit," in Denmark, libraries that receive "public funding" would be covered, in France "publicly accessible libraries, museums, or archives," in Indonesia "public libraries, scientific or educational organizations, and document centres of a non-commercial nature."[163] Applying

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159 The Copyright Act, 1957, Section 52(1)(o).

160 The Copyright (Amendment) Act, 1994, Gazette of India (Extraordinary), Part II-Section 1, June 9, 1994, Explanation, Section 2(1)(fa).

161 The Income Tax Act, 1961.

162 Prashant Iyengar, The Library Exception Under the Indian Copyright Act 1957, SSRN 1555718 (2010).

163 Kenneth D. Crews, *Study on Copyright Limitations and Exceptions for Libraries and Archives: Updated and Revised,* WIPO (June 10, 2015), SCCR/30/3.

the same logic could also lead to the inclusion of a number of "digital library" projects which receive government-aid and whose aim is explicitly to expand the reach of available materials for research uses.

The less obvious issue revolves around the interpretation of the phrase "not available for sale in India." What exactly does this phrase mean, particularly in the context of online retail stores that ship books globally? Iyengar shows that a narrow interpretation that looks at a literal interpretation of availability including for instance the availability of just one book or even only a few books across India would not satisfy this condition. He argues that the crucial word is "available," and this word has to be interpreted both in terms of affordability as well as accessibility.

On the question of affordability, Iyengar uses an approach that looks at price not in absolute terms but on a comparative basis that looks at what the real cost of the book would be keeping in mind the purchasing power of particular countries as determined by their per capita GDP. Accordingly, a "book" would be deemed "available for sale in India" only if the ratio of its price to the per-capita GDP remains constant across all the countries in which it is sold–in other words, it must be equally affordable in India as the country where the same book is most affordably sold.

For example, the book Harry Potter and the Deathly Hollows retailed in 2007 in India at a price of Rs. 1080 (or approx USD 24).[164] This represented about 2.4% of India's per capita GDP (USD 975) at the time. At the same time, the same book retailed at USD 35 in the US representing 0.0008% of its per capita GDP (USD 43,444). Had the book been sold in the US at 2.4% of US per capita GDP, its price would have been USD 1042. If it had been sold in India at 0.0008% of India's per capita GDP, its price ought to have been a mere 0.78 USD or Rs. 35. At a price of Rs. 1080, the book was approximately 30 times less affordable in India than in the US.[165]

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[164] These figures are extrapolated from the time that the article was written and subsequent changes in exchange rates have not been factored in.

[165] Iyengar, *op. cit.*

Iyengar further argues that an understanding of "not available for sale" that is related to "affordability" and "accessibility" is supported in spirit by the language of the Indian Copyright Act which aims to foster access to materials. For instance, Section 6 of the Copyright Act[166] stipulates that if the issue of copies or communication to the public was of an insignificant nature the Copyright Board may deem it not to have been a "publication" (in the context of determining whether a work was "published in India" for purposes of Section 3 of the Copyright Act). This indicates that the legislature did not intend that the terms "publication," "communication," "issuance of copies" and co-ordinate expressions such as "availability" be understood only narrowly or purely in technical terms.

Black's Law Dictionary defines the term "available" as "suitable; useable; accessible; obtainable; present or ready for immediate use. Having sufficient force or efficacy; effectual; valid." The words "useable," "accessible," "obtainable," "present or ready for immediate use" are key to our discussion here.[167] It is clearly not sufficient for a single book shop or even few book shops to have a few copies of a particular title available but that such title must be useable, accessible, obtainable, ready for immediate use for the public at large and not just for few customers.

Access to educational materials in India often depends on the purchasing power of the average Indian student. The GNIPC Comparative Price Tables indicate the relevant price of a book in direct proportion to the gross national income per capita (GNIPC) of the country where it is sold, namely, India, the US, UK and Netherlands.[168] Many students in India either cannot afford expensive first-edition books prescribed by their course of study or do not have access to such material. This is also of special concern for print-disabled students, since the number of books available in formats accessible by the print-disabled is very small. In India,

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166 The Copyright Act, 1957, Section 6.

167 Henry Campbell Black, Black's Law Dictionary (Sixth Edition), West Publishing Company (1990), page 135.

168 *See* Shamnad Basheer, Debanshu Khettry, Shambo Nandy and Sree Mitra, *Exhausting Copyrights and Promoting Access to Education: An Empirical Take,* J. of Intellectual Property Rights, Vol 17, 335-347 (2012). For current data see World Bank, World Development Indicators: Size of the economy, WV.1 (2021).

less than 0.5% of the books available to the sighted are available to the visually impaired, according to the World Blind Union.[169] As discussed previously, Section 52(1)(zb) of the Copyright Act allows an individual or any organization working for the benefit of the persons with disabilities and on a non-profit basis creates accessible format copies or distributes them to persons with disabilities.[170] Given the low availability of books in accessible formats in India, it is imperative to give an expansive reading of the term "available for sale in India" to benefit the print or physically disabled. This would also be in line with Ranganathan's law "books are for all."

It is clear from the record that parliament always intended to give the power to libraries to make copies of any book keeping in mind the fact that research requires access to books and often such scholarship is not publicly available.[171] An examination of one of the early reports, the Joint Parliamentary Committee Report on the Copyright Bill, 1955 is instructive in this regard. The committee, while considering Clause 3 concluded that a work shall not be deemed to be published unless sufficient number of copies have been issued to the public. This is an explicit recognition that for a work to be considered as published in the first place, it was necessary for sufficient copies to be issued to the public, and it leads to the logical conclusion that the issuance or availability of just one or few copies of such work to the public would fail to satisfy the criteria envisaged in the phrase "not available for sale in India."[172]

This was again considered by the Lok Sabha prior to voting on the Copyright (Amendment) Bill, 1992 on March 17, 1992 where it acknowledged that the interest of the reader is of utmost priority to the government and thus, readers should have access to authentic works at reasonable price but not at the cost of quality.[173] We can also examine this from the

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169 N.T. Balanarayan, *CIS campaign to alter copyright law to favour visually impaired,* DNA (September 24, 2009).

170 The Copyright (Amendment) Act 2012.

171 Prashant Reddy T. and Sumathi Chandrashekaran, Indian copyright law from 1952 to 1999: Parliamentary debates, reports & legislation, Volume 3, 24.

172 Id. at 45.

173 Id. at 339.

perspective of preservation. For the sake of argument, let us assume that the term "available for sale in India" is interpreted strictly, then in a scenario where there are insufficient copies of a title, or where the existing copies of books are in very poor condition and cannot use by readers, the ultimate purpose of preservation would be frustrated as readers would not only be deprived of a title but the library would also fail to achieve the purpose of preservation.

The library exceptions in Section 52 compels us to acknowledge that Section 52 has to be read as a whole and not in isolation. More specifically, library exceptions have to be read purposively together otherwise they would fail their objective of facilitating dissemination of knowledge to the public. Making of copies, digitization for preservation and reproduction of unpublished works can neither be done nor be read in isolation as all these activities are intertwined. Consider a scenario where a work not available for sale in India is required for research or personal use by a print or physically disabled person(s), then would it not be appropriate to procure a copy, make copies and digitize it for preservation purpose and then make it available for research and/or personal use? Such facilitation by libraries would not be possible if we read the provisions in isolation.

Thus, it would be appropriate to say that the library exceptions are not exhaustive with regard to permissible actions by a public library, but rather, they supplement other fair-dealing exceptions that individual users enjoy. For instance, a public library, like other users has the right to make copies for "personal or private use including research" (Sec 52(1)(a)) or to make copies of computer programmes in order "to utilize it for the purposes for which it was supplied" or to make "backup copies" (Sec 52(1)(aa)). It would be an absurd consequence if public libraries were denied these expansive freedoms because of the specialised freedom they obtain under the library exception clause. This kind of use has international acceptability. For instance, the library exception in Georgia permits copying for non-profit purposes even by commercial libraries.[174]

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[174] Kenneth D. Crews, *Study on Copyright Limitations and Exceptions for Libraries and Archives: Updated and Revised,* WIPO (June 10, 2015), SCCR/30/3, p. 164.

6. Educational Exception Under Section 52

Amongst the various enabling provisions in Section 52 of the Copyright Act, the pride of place would go to the educational exception enshrined in Section 52(1)(i) of the Copyright Act which permits the reproduction of any work:

a. by a teacher or a pupil in the course of instruction; or

b. as part of the question to be answered in an examination; or

c. in answers to such questions;

This particular provision occupies a special place in the Copyright Act as it serves the crucial function of allowing the use of copyrighted material for the purposes of education. The section was subject to close to judicial scrutiny in two decisions—by a single judge and then a division judge bench of the Delhi High Court—in what is popularly termed as the Delhi University photocopy case.[175] For our purposes, both these judgements of the Delhi High Court are key to this analysis as they allow us to interpret the scope of the educational exception in India in conversation with the library exception. We have already examined the scope of the library exception including the possibility of libraries being able to create backup copies of books. An important question that arises is whether technological developments that facilitate the lending of these digital copies of books for the purposes of education would be covered by the educational use exception?

The key legal question the provision throws up is the interpretation of the word reproduction in the context of the exception, and whether there are any express or implied limitations set upon the quantum of material that can be reproduced. The second question involves the interpretation of the phrase "in the course of instruction" and whether this would be restricted merely to in-classroom instruction or it is of a wider ambit and covers any mode of transacting education. Both these questions were central to the legal issues framed by the Delhi High Court in their two decisions. While the publishing houses who were the

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[175] The Chancellor, Masters & Scholars of The University of Oxford & Ors v. Rameshwari Photocopy Services & Anr. 2016 (68) PTC 386 (Del) (Endlaw J) (Hereafter, Delhi HC); affirmed in part on appeal 2017 (69) PTC 123 (Del) (Nandrajog and Khanna JJ) (Hereafter, Delhi DB) in September 2016.

petitioners had proposed a narrow interpretation that would benefit owners of copyright, both the single judge bench and the division bench rejected this approach.

In the single judge bench decision, Justice Endlaw dismissed the petition in its entirety concluding that no question of copyright infringement arose. According to him, Section 52(1)(i) which allows for the reproduction of protected works in the course of instruction was outside the ambit of the infringement provisions in Section 51. He found that the issue of whether the preparation of course packs was "in the course of instruction" was decided as a question of law, and did not warrant a trial. On appeal the division bench largely affirmed the single bench's approach to this question of law, but remanded the matter for a fact-specific determination as to whether the copyrighted materials included in the course packs were in fact necessary for the purpose of instructional use by teachers.

In a welcome move, the publishers decided not to appeal to the Supreme Court, and in a joint statement, Oxford University Press, Cambridge University Press, and Taylor & Francis acknowledged the importance of course packs for education and stated that rather than protracting the legal battle, they would "work closely with academic institutions, teachers and students to understand and address their needs."[176] While the Indian Reprographic Rights Organization (IRRO) did appeal, a division bench of the Supreme Court refused to admit the appeal since the original petitioners had withdrawn and the IRRO were merely interveners.[177]

The two decisions collectively constitute a significant contribution to a jurisprudence of access, and serve as a benchmark, both in India and beyond, for interpreting national copyright legislations. We shall examine the legal outcomes of both these decisions in considerable detail as their importance for us lies in the ways in which they have advanced a purposive interpretation of Section 52 as well as their interpretation of the role of third parties

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[176] University of Cambridge Media Office, *Joint Statement by Oxford University Press, Cambridge University Press and Taylor & Francis* (March 9, 2017) .

[177] Indian Reprographic Rights Organisation v. Rameshwari Photocopy Service & Ors, Supreme Court Daily Orders CC Nos 9194/2017 (May 9, 2017) (Gogoi and Sinha JJ).

and intermediaries in facilitating the rights of students to access learning materials as an outcome of Section 52.[178]

6.1 The Delhi University Photocopy Case

The key defendant in this case is Rameshwari Photocopiers, a small photocopy shop which had been given space on the campus of the Delhi School of Economics on the basis of a tender and as a part of its agreement with the University, the photocopy shop agreed to provide a stipulated number of pages per student in lieu of payment for an operating license. Accordingly, the Faculty, would assign course materials that could be taken from the library (or other sources) either directly by the shop, or by faculty and students, and given to the photocopy shop. The shop would then circulate the combined photocopied materials to the students at a rate of Forty paise (then) per page. In addition to advancing a narrow reading of Section 52, the publishers had also contended that the photocopying of course packs detrimentally affected the market for their books. Course packs were thus framed as competing products, and if they were made permissible, the publishers argued, the prospects of Indian universities entering into large-scale institution-wide licensing agreements with academic publishers would dwindle, if not disappear altogether.[179]

In their petition, the publishers contended that Rameshwari Photocopiers were reproducing and issuing unauthorized copies of their publications for a commercial purpose and that such circulation did not amount to "fair dealing" under Indian law. As we have noted earlier, India does not necessarily follow general principles such as the four-factor test while determining whether individual using instances fall within fair dealing, and instead what we have is a combination of general fair dealing principles along with specific exceptions under Section 52. The case became an important test case for determining what exactly constitutes fair dealing in India in relation to academic materials. For the publishers this was an important case as it would determine the scope of the educational use exception in copyright law and

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[178] *See* Lawrence Liang, *Paternal and defiant access: copyright and the politics of access to knowledge in the Delhi University photocopy case*, Indian L. Rev 1:1, 36-55 (2017).

[179] *See* Copyright Licensing Agency, United Kingdom, *CLA UUK/GuildHE Higher Education Licence* for an example from the UK higher education context, where the licence provides annual blanket permission to copy restricted amounts from print and digital publications of those copyright owners represented by the Copyright Licensing Agency.

establish whether universities are bound to obtain a license from reprographic societies to create course packs, while for academics and students it implicated the future of equitable access to learning materials.

6.2 A Jurisprudence of Fair Use for Education in India

An important aspect of the Delhi High Court judgements was their recognition of the specific context of educational challenges in India. In the context of the judgement, this specifically translated into a rejection of an approach that adopted doctrinal standards from the United States and other jurisdictions in favour of an approach that firmly understood the specific role of the educational exception in India. As we have already seen, most university libraries across India are severely understocked in terms of the number of books in their possession. The number of copies of individual books that are available for the purposes of borrowing by students are very limited. In many cases, there is only a single copy. There is consequently a huge disparity in demand versus supply for books by students, particularly during exams and assignments.

This shortage has resulted in the formulation of policies which severely affect the ability of students to access such books, including a very limited time that the book can be borrowed for, and under such circumstances it is understandable that an alternative infrastructure of access have emerged in universities across the country to overcome these barriers. One of the most crucial infrastructures that has underwritten access for students is the technology of photocopying and it can be safely presumed that if a book is available to be borrowed only for a day, it is very unlikely that students are going to be able to read substantive portions of the book in a day and return it by the next, and it is therefore understandable that students photocopy sections of the book which are necessary for their assignment or for their research.

By the same token, there is often only a single photocopying machine in the library, which in turn gives rise to networks of copy shops around universities that provide cheap reproduction services. In many Universities across India, for example, there are entire neighborhoods in close proximity comprised of such shops. According to studies done, these shops play a

primary role in ensuring access to materials, serving 85 percent of those who photocopy learning materials.[180] This context was acknowledged by the single judge bench who stated:

> "*73. The matter can be looked at from another angle as well. Though I have held Section 52(1)(a) to be not applicable to the action of the defendant no.2 University of making photocopies of copyrighted works but the issuance by the defendant no.2 University of the books purchased by it and kept in its library to the students and reproduction thereof by the students for the purposes of their private or personal use, whether by way of photocopying or by way of copying the same by way of hand would indeed make the action of the student a fair dealing therewith and not constitute infringement of copyright. The counsel for the plaintiffs also on enquiry did not argue so. I have wondered that if the action of each of the students of having the book issued from the library of defendant No.2 University and copying pages thereof, whether by hand or by photocopy, is not infringement, whether the action of the defendant no.2 University impugned in this suit, guided by the reason of limited number of each book available in its library, the limited number of days of the academic session, large number of students requiring the said book, the fear of the costly precious books being damaged on being subjected to repeated photocopying, can be said to be infringement; particularly when the result/effect of both actions is the same."*[181]

While publishers have routinely complained about the photocopying of academic materials, these complaints had never translated into legal action. Publishers did not see a conflict between the market for their books and exceptional uses allowed under Section 52 of the Copyright Act, and it is likely that they acknowledged the fact that readers of photocopied books today are the buyers of printed books tomorrow.

All of this changed however with the Delhi University photocopy case and in 2011, when three major publishers, Oxford University Press, Cambridge University Press, and Taylor & Francis—sued Delhi University and a photocopy shop on its premises for unauthorized

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180 Joe Karaganis, *Shadow Libraries: Access to Knowledge in Global Higher Education,* International Development Research Centre and MIT Press, ISBN 9781552506080 (2018).

181 Delhi HC ¶ 73.

distribution of course packs to students—alleging that they were entitled to monetary damages to a tune of 60 lakh rupees plus attorney fees.[182] The Delhi case was less about getting the students to buy physical copies of the book as much as creating pressure on the university to impose a reprographic fee for photocopying excerpts as well to impose quantitative restrictions on the amount that can be legally copied from a book.

It is worth emphasizing the fact that if the students were actually expected to buy all of the books in the specific course pack at issue in the suit, it would have amounted to a total retail price of around $1,700. This was a sum slightly larger than average GDP per capita in India at the time. The problem with the proposal for the levy of a reprographic fee was that the envisaged license fee would have more than doubled the price of photocopying from its level (40 paisa or around 0.5 cents) to 1 rupee per page. The publishers argued that this was a relatively small amount that would not affect the students. The license fee, in an often-repeated argument by the publishers, merely amounted to one expensive meal. However, this assumes the perspective of the richest students, not the poorest students who are the real beneficiaries of photocopying. Rather than measuring the fee against imaginary meals, it is more useful to compare this to the average fees paid by students at Delhi University. At the master's level a student pays approximately Rs. 10,000-25,000 per semester, depending on the college where they are enrolled. At one rupee per page, the cost of photocopying materials just for course packs would have amounted to around a significant increase in their fees.

6.3 Four Factor Test

The action by the publishers mimicked legal developments in many jurisdictions where publishers have sought to limit the extent to which photocopied materials can be used for educational purposes. The petitioners, for instance, attempted to persuade the court to adopt the US approach in the Indian context, arguing for the adoption of the four-factor framework for fair use as well as relying on specific cases that have limited the ability to use photocopied course packs. This strategy has to be understood in light of the transformation of the academic market in recent decades, especially in the global north where a combination of

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[182] Shamnad Basheer, *DU Photocopy Case: Who's Afraid of Copyright?,* Spicy IP (October 11, 2012).

aggressive law suits accompanied by favourable courts decisions has resulted in publishers being able to develop a market for photocopy licensing.

In particular, the petitioners relied on Basic Books Inc v. Kinko's Graphics Corporation[183] and Princeton University Press v. Michigan Document Services Inc.,[184] both of which had held that preparation and selling of course packs to college students amounted to infringement. The respondents on the other hand, directed the attention of the court to the dissenting opinion in Princeton University Press, which held that the identity of the person operating the photocopy machine is irrelevant as long as the purpose was the making of copies for the student.

The single judge and the division bench were united in their rejection of any attempt to uncritically adopt comparative law influences, including US standards, into Indian law. While Justice Endlaw focused on the question of legislative freedom, the division bench addressed the need for context specific doctrinal borrowing.[185] Justice Endlaw's opinion argued for a flexible approach to the question of legislative freedom under international treaties, and he concluded that if the Indian parliament allowed for the reproduction of works without any qualitative or quantitative restrictions because it was justified for the purpose of teaching and not unreasonably prejudicial to the legitimate interest of the author, then it was not for courts to impose any limitations on the same.

The division bench similarly reiterated that both Article 13 of the TRIPS Agreement and Article 9 of the Berne Convention provided enough flexibility to countries to incorporate appropriate provisions in copyright statutes for the dissemination of knowledge. As evidence, the court referenced the legislative intent indicated in the parliamentary debate on amendments to the Copyright Act in which the minister had explicitly stated: "Many of these

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183 Basic Books, Inc. v. Kinko's Graphics Corp., 758 F. Supp. 1522 (S.D.N.Y. 1991).

184 Princeton University Press v. Michigan Document Services, Inc., 99 F.3d 1381 (6th Cir. 1996).

185 Delhi HC ¶¶ 99-100, DB ¶¶ 19-20, 64-68.

copyrighted materials can be used, should be used and must be used in non-profit libraries."[186]

6.4 Use of Technology and Role of Intermediaries

One of the strategic decisions made by the petitioners was to make the photocopying shop the primary defendant, and they argued that the act of reproduction was not protected under Section 52(1)(i) because it was carried out through an intermediary and not directly by the teacher or the student. This was a relatively trivial as well as a hypertechnical argument to make, but it afforded an opportunity to the courts to elaborate on the relationship between the existence of a right and the facilitative role played by an intermediary in the exercise of the right. In his opinion, Justice Endlaw took the analogy of photocopying services in courts and in medical colleges and argued that both would be adversely affected were photocopying by intermediaries prevented. He then made observations which has immense significance for looking at the role of libraries and librarians as intermediaries of knowledge. Using an example of his own time as a law student, Justice Endlaw said that it was not an offence for him to physically copy an entire book from a library if the need arose, and the question to be addressed is whether there was a need to impose additional restrictions on technologies that merely make this mode of reproduction easier and facilitated the exercise of this particular right.

> *"75. ... When an action, if onerously done is not an offence, it cannot become an offence when, owing to advancement in technology doing thereof has been simplified. That is what has happened in the present case. In the times when I was studying law, the facility available of photocopying was limited, time consuming and costly. The students then, used to take turns to sit in the library and copy by hand pages after pages of chapters in the books suggested for reading and subsequently either make carbon copies thereof or having the same photocopied. The photocopying machines then in vogue did not permit photocopying of voluminous books without dismembering the same.*

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[186] Delhi DB ¶ 28.

> *76. However with the advancement of technology the voluminous books also can be photocopied and at a very low cost. Thus the students are now not required to spend day after day sitting in the library and copying pages after pages of the relevant chapter of the syllabus books. When the effect of the action is the same, the difference in the mode of action cannot make a difference so as to make one an offence."*[187]

Arguing that with technological advancements, students can technically use their mobile phone camera's to photograph pages from an academic book, Endlaw saw it as being akin to an older form of copying down by hand, either pages or paragraphs of a book. By his reasoning, both the act of copying a book physically as well as taking a photo of the same book constituted an act of reproduction, and the important question was not whether one amounts to reproduction and the other doesn't—rather the question is what the purpose of the reproduction is for.

> *"78. I may also mention another advancement. Today, nearly all students of the defendant no.2 University would be carrying cell phones and most of the cell phones have a camera inbuilt which enables a student to, instead of taking notes from the books in the library, click photographs of each page of the portions of the book required to be studied by him and to thereafter by connecting the phone to the printer take print of the said photographs or to read directly from the cell phone or by connecting the same to a larger screen. The same would again qualify as fair use and which cannot be stopped."*[188]

If the purpose is covered by an exception under Section 52 of the Copyright Act, and the act of reproduction is not an offence in itself, then the simplification of the act through technological advancements should not be considered an offence either. These sections of the judgement have enormous consequences on how we interpret an analogous scenario. If a library is entitled to lending a book in its physical form, and technological advancements subsequently enable the library to lend a book in a digital form but on absolutely the same

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[187] Delhi HC ¶¶ 75-76.

[188] Delhi HC ¶ 78.

equivalent terms as a physical copy. There is a compelling case to be made for treating the two modes of lending of the book on an equivalent basis, and to focus on the actual legal right that is being exercised rather than the technological form through which the right is being exercised.

6.5 Whether any issue of infringement arises at all?

The petitioners claimed that Delhi University had "institutionalised infringement by prescribing chapters from the publications of the plaintiffs as part of its curriculum/syllabus and permitting photocopy of the said chapters and sale thereof as course packs."[189] They grounded their argument on the claim that the reproduction was done commercially, that it affected the market of the publishers, that it was not covered under the exception granted in Section 52(1)(i) since the reproduction of works or parts thereof were not by students and teachers but by an intermediary, and further that it was not in the course of instruction. They sought from the court a narrow interpretation of the phrase "in the course of instruction" and to buttress this argument the petitioners contrasted the original wording of the section ("in the course of preparation for instruction") with its final avatar. The effect of their interpretation would have been to circumscribe instruction in a temporal and spatial manner such that instruction could only mean the actual delivery of a lecture in a classroom, over the course of which teachers could give hand-outs to students. Finally the petitioners sought to locate the statutory educational use exception within the doctrine of fair use, claiming that the four-factor test developed by the United States should be adopted into the Indian context as well.

The single judge bench rejected the publishers' contention. Justice Endlaw began by outlining the foundations of exclusive rights under copyright law, holding that even though they have some basis in natural rights claims, contemporary copyright was entirely a creature of statute and it was therefore the statute that governed the scope of rights granted. Natural rights foundations could not be presumed to be predominant.[190]

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[189] Delhi HC ¶ 14.

[190] Delhi HC ¶¶ 26-27.

Justice Endlaw instead based his decision on the structural logic underlying the Copyright Act. In his reading of the Copyright Act, there is a clear recognition on the one hand of the exclusive rights of the copyright holders in the works including the right to prohibit the reproduction of a work through photocopying. At the same time because there exists specific exemptions which are expressly included in Section 52, it stands to follow that while the general rule is a prohibition against photocopying, there is also a specific exception which permits reproduction, including through photocopying, by teachers and students if such reproduction is in the course of instruction.

There are thus two specific dimensions of the exception: actor-oriented and purpose-oriented. In contrast to the claim that copyright is the norm, and therefore any exception has to be interpreted extremely narrowly, a more accurate account of copyright acknowledges that both exclusive rights and exceptions are entirely a creature of the same copyright statute and therefore have to be treated on an equal footing, rather than in a hierarchical relationship with each other. The specific terms that limit the application of these exceptions are to be found from within the logic of the statute which in the case of the educational exception in Section 52 of the act is circumscribed by an identification of the actors involved as well as the purpose of the reproduction.

Both of these criteria have to be satisfied if a valid case is made for a use to be covered by the exception. Thus, it was certainly not the argument of the respondents that students and teachers were allowed to photocopy materials and use them for commercial reasons including selling copies of the same. Nor was it their case that a person who was not a teacher or student could claim an exemption Section 52(1)(i) if they were photocopying books or academic materials.

The only issue that had to be considered was whether the reproduction of a work by a teacher or a student in the course of instruction fell under the exemption. Justice Endlaw concluded that an act of photocopying by teachers and students is exempted and excluded from the definition of infringement, and consequently there is no question of infringement at all.[191] Reiterating his argument that copyright is not a natural right, but is founded on statutory

[191] Delhi HC ¶ 29.

provisions which have to be interpreted holistically, then within the logic of the Copyright Act, Section 52 clearly identifies a set of acts which are not to be considered as "infringement of copyright," it follows then that Section 52 has to be interpreted following the same rules of interpretation that would be applicable to claims by copyright owners when asserting their exclusive rights.

The division bench affirmed this interpretation while providing an imaginative musical analogy to explain how a statute may provide exclusive rights to commercially exploit a work even as it allowed for the exploitation of the work without compensation. Comparing a statute to a musical work, the court rhetorically asked whether it was "possible that a provision in a statute partially drowns another provision"?[192] Answering this affirmatively, the court suggested that it was desirable that in the melody of a statute all notes should be heard. Sometimes the loudness of one particular provision silences all other provisions, while on other occasions, in order to hear the melody of a statute a section may need to be muted. Underlying their musical analogy, one can discern the division bench articulating a polyphonous theory of copyright that is premised on an acknowledgment of the diverse interests embedded within copyright statutes, not least of which are public interest considerations.

6.6 Narrow versus wide interpretation of instruction

The second major conflict between a narrow and an expansive interpretation arose out of the dispute over what constitutes "instruction" in Section 52(1)(i) of the Copyright Act. The petitioners sought to restrict "instruction" to a classroom context in which there was a direct face-to-face interaction between the teacher and the student. They argued that reproduction could only be allowed in such a situation and does not cover the prescription and preparation of course packs.

At the core of the dispute was the question of when instruction begins and ends. While the petitioners sought a spatial understanding of instruction, the defendants argued for a temporal understanding of instruction which begins much before the classroom interaction and

[192] Delhi DB ¶ 76.

continues after it as well. The effect of adopting the petitioner's argument would have been a completely reductionist and instrumental understanding of education, with serious consequences not just for the question of copyright and access to learning materials but one that would have established a jurisprudence of education completely at odds with the actual manner in which teaching takes place.

Justice Endlaw and the division bench rejected plaintiff's argument and favoured an interpretation of instruction which was more processual. Justice Endlaw focused on the term "in the course of" and followed the Supreme Court's decision in Md. Serajuddin v. The State of Orissa.[193] He held that the term implied not only a period of time during which a movement is in progress but rather it postulates a "connected relation." In addition to the idea of a connected relation, Endlaw also drew on important legal tests that have determined what constitutes "in the course of" including phrases such as "integral part of continuous flow," "causal relationship" and "continuous progress from one point to the next in time."

Applying these tests to the question of instruction, he concluded that a proper understanding of instruction would incorporate the entire academic session for which the pupil is under the tutelage of the teacher, including the preparation of syllabus and reading materials.[194] The Court interpreted the term "in the course of instruction" explaining that "the word "instruction" in the context of a teacher would mean something which a teacher tells the student to do in the course of teaching or detailed information which a teacher gives to a student or pupil to acquire knowledge of what the student or pupil has approached the teacher to learn."[195] Further, the Court observed that "the use of the word 'instruction' preceded with words 'in course of' would mean in course of instruction being imparted and received."

Applying tests as laid down by Court of (i) integral part of continuous flow; (ii) connected relation; (iii) incidental; (iv) causal relationship; (v) during (in course of time, as time goes by); (vi) while doing; (vii) continuous progress from one point to next in time and space; and,

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193 Mohd. Serajuddin Etc vs State Of Orissa, (1975) 2 SCC 47 (Supreme Court of India).

194 Delhi HC ¶ 72.

195 Id.

(viii) in path in which anything moves, the Court held that words "in course of instruction" within the meaning of Section 52(1)(i) of Act, would include reproduction of any work while imparting instruction by the teacher. Receiving instruction by student continues during the entire academic session for which student is under the tutelage of teacher and that imparting and receiving of instruction is not limited to personal interface between teacher and student but is a process commencing from teacher readying herself for imparting instruction, setting syllabus, prescribing text books, readings and ensuring, whether by interface in classroom/ tutorials or otherwise by holding tests from time to time or clarifying doubts of students, that pupil stands instructed in what she has approached teacher to learn.

Similarly, for the term "in course of instruction," the Court observed that even if the word "instruction" has to be given the same meaning as "lecture," it would have to include within its ambit the prescription of syllabus preparation of which both teacher and student are required to do, before lecture and studies which students have to do post lecture, and so that teachers can reproduce work as part of question and students can answer questions by reproducing such work, in an examination.

Consequently, reproduction of any copyrighted work by a teacher for the purpose of imparting instruction to a student as prescribed in the syllabus during academic year would be within meaning of Section 52(1)(i) of the Copyright Act. Thus, the Court opined that the University's act of making a master photocopy of relevant portions (prescribed in syllabus) of plaintiffs' books purchased by the University and kept in its library and making further photocopies out of said master copy and distributing same to students did not constitute infringement of copyright under the Copyright Act.

It is alarming that the petitioners, who comprise some of the most distinguished academic publishers in the world with a long history of contributing to pedagogy and the pursuit of knowledge, would advance such a constricted understanding of educational instruction. This was noted by the division bench, who effectively characterized the petitioner's conception of education as a "boring method" of teaching consisting of unidirectional lectures while the use of readings materials facilitated an "interactive method" more akin to a group discussion anchored in the prescribed readings. The division bench also selectively developed parallels

with the New Zealand decision of Longman Group, where both the additional fairness or fair dealing threshold requirement and "in the course of instruction" had been considered.[196]

6.7 Statutory Exceptions and the requirements of fairness

The next major issue that the courts had to consider was whether an additional requirement of fairness should be read in to Section 52(1)(i) and if so, what form that fairness requirement should take. At this point it is worth once again emphasizing that fair use and fair dealing are not synonymous. The former conventionally refers to a general multi-factor approach to limitations and exceptions in the United States (an open-ended limitations and exceptions test under which identifiable and policy-driven patterns of permitted uses can emerge over time), while the latter is an additional requirement which is attached to defined categories of permitted uses. Therefore in the UK Copyright Designs and Patents Act 1988, there is specific reference to fair dealing as an additional requirement only in Sections 29 (research and private study) and 30 (criticism, review, quotation and news reporting). There are several other limitations and exceptions which make no reference to fair dealing in this legislation.

Indian legislation adopts a similar structure, with "fair dealing" being specifically required only in Sections 39 (acts not infringing broadcast reproduction right or performer's right) and 52(1)(a) (private or personal use, including research; criticism or review; reporting of current events). As a matter of legislative design, India has never had "fair use" because it has never adopted a US-style flexible test potentially capable of accommodating all limitations and exceptions. Using the two terms interchangeably leads to inaccurate analogies and confusion. However, both fair use and fair dealing draw on a similar pool of factors (how much of the original work did the defendant take, for what purpose, etc.) when assessing fairness.

Since Section 52(1)(i) permits the unauthorized reproduction of protected works "by a teacher or pupil in the course of instruction," with no reference to "fair dealing," the publishers argued that (a) fairness-derived limits nevertheless ought to be read in to this provision and (b) the content of those fairness limits should be borrowed from the US fair use test. This would have had the effect of serving as a limiting principle, and it is understandable

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[196] Longman Group Ltd. vs Carrington Technical Institute Board of Governors, 2 NZLR 574 (High Court) (1991).

why the petitioner found it attractive. The third and fourth factors of the US test refer respectively to the quantum of material taken and the impact of the defendant's use on the potential market of the work. Both courts resisted this attempt at selective legal transplantation. Justice Endlaw drew a clear distinction between the general principles of fair dealing, which were applicable to personal use and research under Section 52(1)(a) and other uses envisaged in the rest of the section. Distinguishing between an omnibus or general clause and a special provision, he concluded that Section 52(1)(i) dealt specifically with the needs of education and could not be expanded or restricted by applying the general principles of fair dealing and broadly applicable tests developed for its interpretation.

The division bench went on to address this question in greater detail. It was willing to accept that there "has to be fairness in every action…irrespective of a statute expressly incorporating fair use, unless the legislative intent expressly excludes fair use."[197] While some degree of fairness should serve as a barometer for all permissible acts, it was clear that the legislature had not incorporated a specific conception of fair dealing or fair use as a limiting principle when allowing for reproduction by teachers and students and the court stated: "Therefore, the general principle of fair use would be required to be read into the clause and not the four principles on which fair use is determined in jurisdictions abroad."[198]

As for the content of fairness in this context, the unauthorized use would be permissible to the extent justified by the purpose of the use. It would have no concern with the extent of the material used, neither qualitative nor quantitative. So much of the copyrighted work can be fairly used as is necessary to effectuate the purpose of the use, i.e. to make the learner understand what is intended to be understood.[199]

This approach of the court stands in sharp contrast to the market-oriented understanding of fairness espoused by the petitioners and can instead be located more convincingly within a norm of distributive justice. Even though not explicitly stated in either of the decisions, the

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[197] Delhi DB ¶ 31.

[198] Id.

[199] Id. at 33.

implications of this anchoring of copyright doctrine within a philosophy of access to knowledge have far-reaching consequences for a reframing of the normative values underlying copyright. If the focus of copyright has been on respecting property rights, the alternatives to intellectual property which have emerged as global movements (including movements such as free software, open content, open access) have relied upon two primary social principles of freedom and of access.

While the former focuses on the threats of punitive copyright regimes on creative expressions, they have tended to resonate with the concerns of the global north. In this imaginary, the figure of the remixer emerges as a heroic figure of resistance. At the same time the access to knowledge movement, beginning with access to medicine and spreading to knowledge and culture, has been similarly concerned with the effects of an expansionist intellectual property regime but aligns itself less with freedom and more with equity. The demand for access is always a structural claim for distributive justice.[200]

The global significance of the two Delhi High Court decisions flows from the manner in which they provide us with a conceptual vocabulary for reconciling the two social imaginaries or traditions of liberty and equity.[201] It is perhaps only befitting that Amartya Sen was one of the first public voices to come out in support of the right of students to access learning material. Sen's conceptualization of development as freedom was premised on the idea that "unfreedom" is constituted by lack—whether of choice or of opportunities—and an integrated understanding of political freedom would necessarily have to embrace principles of distributive justice.[202] Appositely, Sen's argument of "social opportunities" being one of the key determinants not only for the conduct of private lives but for political participation was illustrated by the right to read and communicate. Education is understandably high on the list of Sen's criteria for establishing the link between development and freedom, and it to this aspect of the judgment that we now turn.

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200 *See* K. Aoki, *Distributive and Syncretic Motives in Intellectual Property Law (with Special Reference to Coercion, Agency, and Development)*, 40 UC Davis L Rev 717 (2007); Molly Shaffer van Houweling, *Distributive Values in Copyright,* 83 Texas L Rev 1535, 1540 (2005).

201 Delhi DB ¶ 30.

202 *See* Amartya Sen, *Development as Freedom,* Oxford University Press (1999).

6.8 Market-Based Versus Education-based Approaches to Section 52

In the arguments before the single judge bench the petitioners had specifically anticipated a public interest argument and sought to nullify it, arguing that no such arguments could be recognized outside the scope of Section 52 and that no other relief in the public interest could be claimed. In their rejoinder they added without irony that public interest arguments could not be myopic and should be interpreted keeping in mind the incentives for writers and publishers to produce works. What the petitioners were effectively arguing for was a free market conception of the public interest in which the market and commercial interests of publishers would be the sole determinative factor. The Delhi University case countered this argument by acknowledging that although the dispute arose in a copyright context, it had to be judged in light of constitutional principles.

The right to education was found in both the fundamental rights chapter of the Constitution and the directive principles of state policy, while the right to access knowledge was a key component of the right to education. Similarly, Article 13 of the International Covenant on Economic, Social and Cultural Rights (ICESR) provides that the states parties "recognize the right of everyone to education."[203] More specifically, Article 13 of ICESCR states that "primary education shall be compulsory and available free to all." Article 14 creates an obligation on each state party that has not been able to secure free and compulsory primary education to create a detailed plan of action for the progressive implementation.[204] In addition to the international treaties discussed above, it is only fitting that the Constitution of India be amended to provide for free and compulsory education for children.[205]

It is relevant to mention here that even before the Constitution recognized the right to education as a fundamental right, it recognised the same as one of the duties of the State under the Directive Principles. Article 41 of the Constitution of India provides that "the State shall, within the limits of its economic capacity and development, make effective provision

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[203] United Nations, *International Covenant on Economic, Social and Cultural Rights,* General Assembly Resolution 2200A (XXI) (December 16, 1966).

[204] Id.

[205] The Constitution (Eighty-Sixth Amendment) Act, 2002.

for securing the right to work, to education and to public assistance in cases of unemployment, old age, sickness and disablement, and in other cases of undeserved wants."[206] Further, Article 45 specifically provides for free and compulsory education for children.[207] It mandates that the State shall endeavour to provide, free and compulsory education for all children until they complete the age of fourteen years.[208]

Even before the right to education was introduced as a separate fundamental right, the Supreme Court of India read the right to education as a fundamental right encompassed in Article 21 which provides for the right to life and personal liberty. Therefore, the apex court always acknowledged that the right to education was a justiciable fundamental right. The Supreme Court of India in Mohini Jain v. State of Karnataka stated that that the right to life also includes the right to education.[209] Subsequently, the Constitution of India was amended in the year 2002 and Article 21A was introduced which makes it incumbent upon the State to provide free and compulsory education to all children of the age six to fourteen years. It is pertinent to note here that Article 21A officially introduced the right to education as a justiciable fundamental right in India. Thereafter, in the year 2009, the Right of Children to Free and Compulsory Education (RTE) Act, was introduced.[210] This legislation casts a legal obligation on the central and state governments to ensure that the fundamental right enshrined under Article 21A is protected. The act provides for compulsory education for children of the age six to fourteen years.

Both courts rejected any presumption of a market-based conception of the public interest and instead chose to situate public interest within the educational challenges of a country where access to quality leaning materials varies depending upon class, caste and other social barriers. This is evidenced in the division bench's observations:

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206 Constitution of India, Art. 41.

207 Constitution of India, Art. 45.

208 Ibid.

209 Miss Mohini Jain vs State Of Karnataka And Ors, 1992 SCR (3) 658 (Supreme Court of India).

210 The Right of Children to Free and Compulsory Education Act, 2009, Act No. 35 of 2009 (August 26, 2009).

> "*It is thus necessary, by whatever nomenclature we may call them, that development of knowledge modules, having the right content, to take care of the needs of the learner is encouraged. We may loosely call them textbooks. We may loosely call them guide books. We may loosely call them reference books. We may loosely call them course packs. So fundamental is education to a society – it warrants the promotion of equitable access to knowledge to all segments of the society, irrespective of their caste, creed and financial position. Of course, the more indigent the learner, the greater the responsibility to ensure equitable access.*"[211]

The Court asserted that the reproduction of an entire work as part of a literacy programme does not affect the potential market of the publisher as the beneficiaries of the literacy programme are not potential customers. Similarly, a student is not a potential customer for buying thirty or forty reference books! If course packs are not available, such a student will go to the library for accessing the books. The Court finally held that it "could well be argued that by producing more citizens with greater literacy and earning potential, in the long run, improved education expands the market for copyrighted materials."[212] The Court then turned to the interpretation of the phrase "in the course of instruction" from Section 52(1)(i), Copyright Act, 1957.[213] The appellants argued for a restrictive interpretation of the phrase. In their opinion, the phrase was limited to direct face-to-face interaction between the teacher and the student. However, the Court held that using the word "course" means that the protection covers the entire process of education in a semester and thus, permits reproduction of any work while the process of imparting instruction by the teacher and receiving instruction by the pupil continues.

6.9 Infrastructure content and equitable access

While copyright law is usually thought of in terms of content (i.e. the outputs), creativity and incentives for production, the actual process of knowledge production and dissemination is enmeshed in complex networks of infrastructure and circulation. Within copyright one can

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[211] Delhi DB ¶ 31.

[212] Delhi DB ¶ 36.

[213] Delhi DB ¶¶ 56–60.

see doctrinal divergences that emerge from a sole focus on content versus a holistic focus that also looks at infrastructure and the political economy of creativity. The landmark fair use case of the US Supreme Court in Campbell v. Acuff Rose,[214] which found the making of parodies to be within fair use, is an example of a content-driven understanding of copyright. In contrast the Ninth Circuit of the U.S. Court of Appeals in Sega v. Accolade, which recognized reverse engineering of computer programs to be within fair use, could be seen as example of copyright doctrine that is located within an understanding of the critical role of competition and infrastructure in the knowledge economy.[215]

The Sega decision highlights a wider understanding of the role of normative criteria such as distributive justice as being necessary to fully determine the governance structure for the intellectual property commons. Distributive justice in this view enables social arrangements "that aid and distribute resources to those who are excluded from democratic and market arrangements." Thus, even as we think of universities and publishers as critical actors in an ecology of knowledge we cannot lose sight of the fact that in countries like India the photocopying machine has always been one of the unsung heroes of knowledge dissemination. This attention to infrastructures of learning was not lost on the court and in his decision, Justice Endlaw observed:

> *"It cannot be lost sight of that we are a country with a bulging population and where the pressure on all public resources and facilities is far beyond that in any other country or jurisdiction. While it may be possible for a student in a class of say 10 or 20 students to have the book issued from the library for a month and to laboriously take notes therefrom, the same is unworkable where the number of students run into hundreds if not thousands."*[216]

Similarly, the division bench, when addressing the question of an adverse impact on the underlying market for books, cites the example of literacy programmes to conclude that the

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214 Campbell v. Acuff Rose, 510 US 569 (1994).

215 Sega v. Accolade, 977 F. 2d 1510 (9th Cir 1992).

216 Delhi HC ¶ 89.

reproduction of an entire work as a part of a literacy programme cannot be said to affect the underlying market of books since the recipient is not a potential customer. They find this comparable to the case of students who require reference books. Rather than accepting the averment of the petitioners that mass scale photocopying threatens to destroy the market for academic books, the court instead concludes that it "could well be argued that by producing more citizens with greater literacy skills and earning potential, in the long run, improved education expands the market for copyrighted materials."[217]

7. Personal Use and Research Exception

The usual emphasis in discussions on copyright tend to focus on the creators and the owners of copyright, but in recent times there has been a gradual acknowledgement of the importance of the role of users within the ecology of copyright. This recognition moves away from a one-way street approach to creation which places the creator at the top of the hierarchy and the user at the very bottom; it instead builds on a more interactive theory of creation that acknowledges that any advancement in creativity and knowledge emerges from a healthy mix between original works and the ability to build on them by end-users. This is particularly true in the domain of academic knowledge and scientific research where the ability to "stand on the shoulders of giants" is not merely desirable but is in fact the very essence of academic knowledge.[218]

This is particularly pressing in our modern times for access to scientific research and other academic knowledge. Discussing the law library of Chekh Anta Diop University in Dakar, which is not populated with books of because of their costs, but only with photocopies of books, historian Peter Baldwin says:

> *"How unfair that some parts of the world wallow in a surfeit of information while elsewhere a third for knowledge finds no slaking. What makes this crass*

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[217] Delhi DB ¶ 36.

[218] Newton's famous saying "if I have seen further, it is by standing on the shoulders of giants" has served as a credo for many copyright scholars who advance an argument for the public domain. *See* Sir Isaac Newton, *Letter to Robert Hooke,* 5 Feb. 1675/6, *Correspondence of Isaac Newton,* H. W. Turnball (ed.), Cambridge University Press (1959).

> *disparity not just another instance of global maldistribution is that, in our era of astonishing intellectual flourishing, we also have the means to give all knowledge to every human at no significant new cost."*[219]

Access to knowledge is particularly pressing in the global south and it is crucial that copyright maintains an appropriate balance. It is to maintain this balance for access to academic knowledge and scientific knowledge that most copyright statutes across the world include a personal use and research exception. We will examine the contours of what personal use and research may mean but at the outset it is worth emphasizing that while other exceptions such as the educational exception and the library exception are dependent on an institutional structure within which a user is located, the personal use exception has particular significance given the fact that it covers a wide range of users who are not necessarily within an institutional context. This becomes significant in the aftermath of the Internet emerging as the primary mode through which individuals access information and conduct research. Before the advent of the Internet there were relatively few circumstances under which a person could conduct research without accessing an intermediary institution such as an archive, library or institutional repositories and databases.[220] This has drastically changed with the Internet where the lines between all of the aforementioned have become blurred, and consequently it becomes important to understand research in the widest sense of the term and focus less on the institutional context in which it is conducted, and more on the nature of the activity, the identity of the person conducting it, and the purpose for which a work is being used.

Even though we are addressing it last, the research exception is the first exception listed under Section 52 of the Copyright Act which allows for a "fair dealing with any work, not being a computer programme, for the purposes of private or personal use, including research." The present version of the provision is a result of a substantial amendment of the Copyright (Amendment) Act, 1994, which substituted the term "research or private study" with "private or personal use, including research." This provision was further amended in

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219 Peter Baldwin, *Athena Unbound: Why and How Scholarly Knowledge Should Be Free for All,* MIT Press (2023), p. 13.

220 For an insightful and comprehensive overview of the right to research see, M. P. Ram Mohan Aditya Gupta, Right to Research and Copyright Law: From Photocopying to Shadow Libraries, Indian Institute of Management Ahmedabad, W. P. No. 2021-09-03 (September 2021).

2012, and if earlier it was restricted to particular classes of works such as literary, artistic and dramatic, in the aftermath of the amendment the exception extends to all works other than a computer program.[221]

Subsequent to the amendment, cinematograph and sound recordings have also came under the ambit of the exception. It is to be noted that the exception is defined through an inclusive definition, and it is an established principle of statutory interpretation that the use of the term "includes" in an interpretation clause extends the scope of the definition.[222] The usage of the term "includes" in statutory language often signals the legislature's intent to "enlarge the meaning of the words and phrases occurring in the body of the statute."[223] The Supreme Court of India in 2009 clarified that inclusive definitions are used: "(1) to enlarge the meaning of words or phrases so as to taken in the ordinary, popular and natural sense of the words and also the sense which the statute wishes to attribute to it, (2) to include meaning about which there might be some dispute, and (3) to bring under one nomenclature all transactions possessing certain similar features but going under different names."[224]

In discussions during the amendment to the Copyright Act in 2013, it was argued, particularly by Internet service providers, that the inclusion of a broad personal use exception that extended to cinematograph films would facilitate piracy as it would cover the electronic storage offerings for personal use. They alleged that the words personal or private use were very vague, wide and undefined and that it was not reasonable to extend the fair dealing provisions for private use.[225] Notwithstanding these reservations, the Parliament proceeded to amend Section 52(1)(a) to include the phrase "private or personal use, including research.

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221 There are specific exceptions provided for computer programs.

222 It is an established principle of statutory interpretation that the use of the term includes or including "is "generally used to enlarge the meaning of the preceding word." Prasanta Kumar Mitra & Ors vs India Steam Laundry, APO 112 of 2017 (High Court of Calcutta) (September 5, 2018) at 43.

223 In S M James and another vs Dr Abdul Khair, AIR 1961 Pat 242 (1960), the Patna High Court pointed out that the word including is a term of extension and adds to the subject matter already comprised in the definition

224 Karnataka Power & Anr v Ashok Iron Works, (2009) 1 SCC 240 (Supreme Court of India), ¶ 16.

225 Department–Related Parliamentary Standing Committee on Human Resource Development, Two Hundred Twenty-Seventh Report on Copyright Amendment Bill, 2010, ¶¶ 51-54.

"Apart from the established meaning of inclusive definitions, there are constitutional justifications for providing a broad interpretation to Section 52(1)(a)(i), Copyright Act, 1957. As we have observed earlier, the Constitutional right to freedom of speech and expression, the right to life and personal liberty, enshrined respectively in Article 19(1)(a) and Article 21 of the Constitution of India, have been interpreted to encompass a right to research. In 1966, a full bench of the Delhi High Court expanded the scope of Article 21 to include "a right to acquire useful knowledge," which in the opinion of the Court was "necessary for the orderly pursuit of happiness by free men."[226]

The Supreme Court of India in 1980 ruled that the ambit of Article 21 includes the provision for facilities of "reading, writing and expressing oneself in diverse forms."[227] Again in 1997, the Supreme Court of India included "social, cultural and intellectual" fulfilments as a part of the right to life.[228] Such a broad conception of Article 21 would include knowledge acquisition by scientists/academics and researchers and could therefore be understood to harbour the constitutional protection of "right to research." This interpretation echoes the opinion of scholars who have argued in the American context that a broad conception of the term liberty, as used in the Fourteenth Amendment of the American Constitution, should incorporate a right to research.[229] In making the argument, reliance was placed on the decision of the United States Supreme Court in Meyer v. Nebraska where "liberty," was held to include the "right to acquire useful knowledge."[230] Similarly, in India, in Wiley v. Indian Institute of Management,[231] the Delhi High Court held that the purpose of Section 52 in Indian Copyright law is to protect the freedom of speech and expressions, which is

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226 Rabinder Nath Malik v The Regional Passport Officer, New Delhi, AIR 1967 Del 1 (FB) (Delhi High Court), ¶ 24.

227 Francis Coralie Mullin v The Administrator, Union Territory of Delhi 1981 AIR 746 (Supreme Court of India), ¶ 8.

228 Samatha v State of Andhra Pradesh (1997) 8 SCC 191 (Supreme Court of India), ¶¶ 247–248.

229 John A. Robertson, The Scientist's Rights to Research: A Constitutional Analysis, 51 S. Cal. L. Rev. 1203 (1977-1978), 1203, 1212.

230 Meyer v Nebraska 262 U.S. 390 (1923).

231 Wiley Eastern Ltd v Indian Institute of Management, 61 (1996) DLT 281(DB) (Delhi High Court).

guaranteed by Article 19(1)(a) of the Constitution of India.[232] Hence, both the established interpretation of inclusive definitions and the constitutional basis of the right to research requires the Courts to interpret Section 52(1)(a)(i) in its broadest possible enunciation.

7.1 Definition of research

While the statute itself does not define or circumscribe the ambit of what constitutes research, one can look to another provision, namely section 32 of the Copyright Act, to glean the meaning of the word research for the purposes of Section 52. It is to be noted that Section 32 deals with compulsory licenses and the research provided in section 32 is therefore only indicative and not exhaustive. Notwithstanding, it is still useful to have section 32 as a broad guiding principle on the definition of the term research in the law.

Section 32(6) provides:

> *"(c) 'purposes of research' does not include purposes of industrial research, or purposes of research by bodies corporate (not being bodies corporate owned or controlled by Government) or other association or body of persons for commercial purposes;*
>
> *(d) 'purposes of teaching, research or scholarship' includes—*
>
> > *(i) purposes of instructional activity at all levels in educational institutions, including Schools, Colleges, Universities and tutorial institutions; and*
> >
> > *(ii) purposes of all other types of organised educational activity."*[233]

In addition to the Copyright Act at the national level, there are also legal rules and standards that govern private use and these can be found in various legal sources including the Berne

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232 Id.

233 Copyright Act, Section 32(6)(d).

Convention and the TRIPS agreement (1886),[234] the Rome Convention (1961),[235] the WIPO Copyright Treaty (1996),[236] and the European Copyright Directive (2001).[237]

The Berne Convention does not refer explicitly to private use as an exception to copyright; rather, private use falls within the well-known Berne Convention "three-steps" rule specified in Article 9(2) that reproduction in special cases, which does not conflict with a normal exploitation of the work nor unreasonably prejudices the legitimate interests of the author may be allowed by member states. The Rome Convention refers to private use in Art. 15(1)a, which provides that any contracting state may provide in its domestic legislation an exception for private use. The 1996 WIPO Copyright Treaty allows contracting parties the latitude to provide limitations (such as private copying) in Art. 10(1), in cases that do not conflict with the normal exploitation of the work or unreasonably prejudice the legitimate interests of the author; it appears to replicate the three-step test of the Berne Convention. Laws such as the Tunis Model Law also allow for the reproduction of a work for "the user's personal and private use." [238]

While the term personal use and research may, on the face of it, appear to be ambiguous and broad, this exception has also been circumscribed through judicial interpretation and it is easy to establish at least a minimum set of circumstances and context that it seems to address. This is an exception that is qualified by the term fair dealing which means that it has to satisfy the legal criteria of what counts as fair dealing. In general, it is presumed that personal use of copyrighted materials will fall outside the ambit of commercial or for profit usage, and accordingly does not come into conflict with the fourth factor of the four factor test as it has developed in copyright jurisprudence within the United States.

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234 WIPO, *Berne Convention for the Protection of Literary and Artistic Works* (1886 et. seq.).

235 WIPO, *Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations* (1961).

236 WIPO, *WIPO Copyright Treaty* (1996).

237 Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society.

238 WIPO, *Tunis Model Law on Copyright for Developing Countries,* WIPO 812(E) (1976).

The most common example cited of an instance of personal use including research would be that of a student copying a portion of the text as a part of their research. This would have been a relatively straightforward instance that would have fallen within the ambit of the deep personal use exception, but publishers and owners of copyright had raised objections, primarily on technological grounds and the transformation of the modes through which an individual may copy, reproduce or communicate portions of a work.

For instance, In Blackwood v Parasuram the court clarified that private study did not involve publication but if a work was published, it could not take protection under the clause relating to private study.[239] The judgement quoted Copinger and F.E. Skone James's commentary to state "Private study only covers the case of a student copying out a book for his own use, but not the circulation of copies among other students."[240] The Blackwood court also rejected arguments that a guide book, which is a summary of a copyrighted work with substantial reproductions from the same in the form of extracts, is a research work since research is "an investigation directed to the discovery of some fact by careful study of a subject; investigation, inquiry in to things."[241] At the same time, as far back as 1965, the Jammu and Kashmir High Court had highlighted that "under the guise of a copyright the authors cannot ask the court to close all the doors of research and scholarship and all frontiers of human knowledge."[242]

If we turn to the United States and Canada for a comparative perspective, we find an early instance of this question being addressed in detail in Williams & Wilkins Company v. The United States.[243] This case concerned an action for infringement of copyright by a medical publisher against the Department of Health, Education and Welfare through the National Institutes of Health and the National Library of Medicine. The National Library of Medicine

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239 Blackwood and Sons Ltd. vs A N Parasuraman and Ors, AIR 1959 Mad 410 (Madras High Court).

240 F.E. Skone James, *Copinger on the Law of Copyright* (6th ed.), Sweet & Maxwell (1927), 123.

241 Blackwood and Sons, quoting the C. T. Onions (ed.), *Shorter Oxford Dictionary,* Oxford University Press (1933), Volume II, 1712.

242 Romesh Chowdhry vs Kh Ali Mohamad Nowsheri, AIR 1965 J&K 101 (1965).

243 Williams & Wilkins Company v. The United States, 487 F. 2d 1345 (Ct.Cl. 1973).

was alleged to have infringed the copyright by making photocopies of the articles published in the medical journals and distributing the same amongst students, physicians and scientists engaged in medical research.

It was held that the photocopying process did not even amount to printing or reprinting in the dictionary sense. If the requester himself made a photocopy of the article for his own use on a machine made available by the library, he might conceivably be "copying" but he would not be "printing" or "reprinting." The library is in the same position when responding to the demands of individual researchers acting separately. There is no "publication" by the library, a concept which invokes general distribution, or at least a supplying of the material to a fairly large group. It is common for courts to be given photocopies of recent decisions with the publishing company's headnotes and arrangement and sometimes its annotations. It cannot be believed that a Judge who makes and gives to a colleague a photocopy of a law review article, in one of the smaller or less available journals, which bears directly on a problem both Judges are considering in a case before them, is infringing the copyright. The court found that the library was not attempting to profit or gain financially by the photocopying. The medical researchers who had asked the library for the photocopies and the scientific researchers and practitioners who need the articles for personal use in their scientific work and have no purpose to re-duplicate them for sale or other general distribution. The act was to gain easier access to the material for study and research, care had been taken not to have excessive copying from one issue or one volume of the periodical and the recipients were not using the library's photocopying process to sell the copies or distribute them broadly. In short, photocopying falls within fair use.

It accordingly concluded that there was no infringement of copyright. It was further held that "use is not the same as infringement and use short of infringement is to be encouraged." This decision of the Court of Claims was subsequently affirmed by the US Supreme Court in Williams & Wilkins Company v. U.S.[244]

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244 Williams & Wilkins Company v. United States, 420 US 376 (1975).

The Canadian courts also had a few opportunities to consider the scope of the personal use exception. In CCH Canadian v. Law Society of Upper Canada,[245] the Supreme Court of Canada arrived at a broad reading of Canadian Copyright law's research and private study exception.[246] In this case, the Law Society of Canada operated a Great Library in Ontario, which offered a not-for-profit photocopying service to its members. Objecting to the service provided by the library, publishers initiated copyright infringement proceedings against the law society. Canadian law is similar to English copyright law, and provides a specific exemption for research from the scope of copyright infringement.[247] Interpreting the scope of this exemption, the Canadian Supreme Court concluded that the library's activities were largely commercial in nature. However, the Court stated, "research for the purpose of advising clients, giving opinions, arguing cases, preparing briefs and factums is nonetheless research."[248] The term "research" was interpreted very liberally to ensure that users' rights are not "unduly constrained" or "limited to non-commercial or private contexts."[249] Lawyers carrying on the business of law for profit are conducting research within the meaning of Section 29 of the Copyright Act of Canada.[250]

The issue of private study and research was considered at length by the Supreme Court of Canada in Alberta (Education) v. Canadian Copyright Licensing Agency.[251] This case considered the question about whether teachers could make available materials for students to take home to study. It was argued that this copying of materials did not fall under fair dealing for research or private study, as the copies were not requested by the students themselves. It was argued that since the copies were not made at the request of students, it did

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245 CCH Canadian Ltd. v. Law Society of Upper Canada, 2004 SCC 13, Supreme Court of Canada (March 4, 2004).

246 Canadian Copyright Act, Section 29, (R.S.C., 1985, c. C-42).

247 Id.

248 CCH Canadian Ltd., ¶ 51.

249 Id.

250 Id.

251 Alberta (Education) v. Canadian Copyright Licensing Agency, 2012 SCC 37 (Supreme Court of Canada).

not fall within the personal use and research exception. The court disagreed with this interpretation, and held instead:

> *"…there is no such separate purpose on the part of the teacher. Teachers have no ulterior motive when providing copies to students. Nor can teachers be characterized as having the completely separate purpose of 'instruction'; they are there to facilitate the students' research and private study. It seems to me to be axiomatic that most students lack the expertise to find or request the materials required for their own research and private study, and rely on the guidance of their teachers. They study what they are told to study, and the teacher's purpose in providing copies is to enable the students to have the material they need for the purpose of studying. The teacher/copier therefore shares a symbiotic purpose with the student/user who is engaging in research or private study. Instruction and research/private study are, in the school context, tautological."*[252]

Rather than defining research in a fragmented manner, the court looked at the relationship between the teacher, student and the process of research on a continuum where it was possible for teachers to facilitate private study by students by providing them with the requisite material. The court reasoned that if the student had obtained the materials on their own and used it for their personal study, this would have falling within the personal use and research exception and the only question then that arose was whether an intervention by the teacher significantly altered the nature of this right. The court concluded that photocopies made by a teacher and provided to primary and secondary school students are an essential element in the research and private study undertaken by those students.

The fact that some copies were provided on request and others were not, did not change the significance of those copies for students engaged in research and private study. It also rejected the statement made by the Board and endorsed by the Federal Court of Appeal, relying on University of London Press,[253] that the photocopies made by teachers "were made for an unfair purpose—"non-private study"—since they were used by students as a group in class, and not "privately." As discussed above, the holding was simply that the publisher

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[252] Id.

[253] University of London Press, Ltd. v. University Tutorial Press, Ltd., 2 Ch. D. 601 (1916).

could not hide behind the students' research or private study purposes to disguise a separate unfair purpose—in that case, a commercial one. The court did not hold that students in a classroom setting could never be said to be engaged in "private study." They rejected a narrow understanding of the word private stating that the word "private" in "private study" should not be understood as requiring users to view copyrighted works in splendid isolation. Studying and learning are essentially personal endeavours, whether they are engaged in with others or in solitude. By focusing on the geography of classroom instruction rather than on the concept of studying, the Board again artificially separated the teachers' instruction from the students' studying.[254]

8. Controlled Lending by Public Libraries in India

In copyright law, as in life, context is everything. As we come to the end of our survey of copyright, fair use and access to scholarly material, it is important to return back to the context in which these questions play out, and on that count it would be impossible to ignore the most significant event that has transformed our lives in recent times, the pandemic. The Covid-19 crisis took an immeasurable toll on the lives of people across the world and we are yet to fully comprehend the kind of economic, social and psychological impact that the pandemic has unleashed.

While there is little that one can do to anticipate or prevent a global health crisis of this nature, what became abundantly clear through the on unequal impact that the pandemic had on people in different parts of the world, was the role of public institutions and public infrastructure. Countries that possessed a better public health system felt the impact of the pandemic much less severely than those which did not. One of the vital lessons from the pandemic is the fact that the outbreak of a crisis may be unavoidable, but the adverse impacts of the crisis are certainly avoidable through better public policies. One of the crucial lessons that all governments have learnt in the aftermath of the pandemic is the importance of a renewed commitment to building public infrastructure and promoting policies that foreground the efficient delivery of public services. It would however be a mistake to limit this commitment only to the domain of health infrastructure.

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254 Id.

In addition to the immense cost in terms of lives and health, one of the most significant effects of the pandemic was felt in the domain of education. Schools, colleges and universities were effectively shut for two years, and education moved entirely into an online context. Students were asked to adapt overnight to an online learning environment, and this transition was understandably experienced very differently by those who have relatively good access to technology and infrastructure and those who did not.

What was common though to all students, across social class, was the dire fact that they did not have access to libraries for two years of their educational lives. Basic books and learning materials were unavailable to most students and researchers, and even in cases where the basic materials were available, for researchers such as PhD scholars who necessarily have to rely on advanced academic material, the ability to or obtain materials and the ability to conduct research were indistinguishable. Students relied on networks of access including teachers and librarians who went out of their way to ensure that students were provided with scanned materials; online libraries and databases temporarily changed the terms of their service to ensure greater access. For a change, at least some owners of copyright also lowered the shrill rhetoric of copyright infringement, recognising that there are problems and challenges which are more urgent than the strict enforcement of copyright.

If context is indeed everything, it becomes all the more important for us to critically examine the condition of access to learning materials in a country like India. It would be politically and morally erroneous to assume that the end of the pandemic signals a "back to business' approach in the arena of educational infrastructure, because the fact of the matter is that many educational institutions in the country continue to languish as a result of inadequate infrastructure, particularly in the realm of books and libraries. While the pandemic may have been a leveller of sorts, foregrounding for the first time, the problem of access, even for those accustomed to readily available books and learning materials, it is essential for us to acknowledge that the conditions of access in ordinary colleges and universities around the country, even before the pandemic was already in a state of perpetual crisis.

It is in this context that we have undertaken this analytical survey of copyright exceptions and limitations, and to better understand the structural design of the Copyright Act and the role

that these exceptions have to play in India. It is an interesting coincidence that the post-pandemic moment also coincides with a nationwide adoption of the National Education Policy, arguably one of the most significant educational policy statements in many decades.[255] Aimed at bringing Indian universities up to a global standard, the National Education Policy makes a compelling case for moving education away from a straitjacketed idea of rote learning through disciplinary entrenchments, and argues instead for a robust and creative approach to learning. Since crisis and opportunity often go hand in hand, this is an opportune moment for us to evaluate and consider how our existing copyright framework facilitates or inhibits the attainment of such a vision of education as a public good.

A narrow focus in copyright law will not give us a proper picture of the role of libraries. Libraries have to be seen through multiple prisms that takes into account the role of actors (students, teachers, librarians), the purpose and aims of the library (deepening and widening access), the technological context (digitisation) and finally the values at stake (equality of opportunity, equitable access and freedom of speech and thought). To understand fair use in India we must understand that exceptions and limitations, exist not in narrow silos, but in coexistence with each other with a common purpose of access to knowledge. We examined individual exceptions in the Copyright Act, to ask what these exceptions sought to achieve, and how these goals existed both as stand alone ends, but also as vital cogs, that necessarily had to cohere with other pieces, within the ecology of knowledge and learning.

The campaign of visually disabled users for a wide exception in copyright law demonstrated that access cannot be taken for granted; rather it has to be facilitated both by technology and by law. Technology by its very nature is always a few steps ahead of the law in terms of the specific affordances that it provides; the acceleration of screen reading technologies transformed the reading worlds of the visually disabled even as copyright law shriveled this world through excessive legal formalism. The efforts of the campaign resulted in the introduction of copyright exceptions that privileged users rights over narrow discussions of format specificity or concerns over leakage.

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[255] Government of India, Ministry of Human Resource Development, National Education Policy 2020 (July 29, 2020).

The visual disability exception provided an elegant solution, circumscribing the kinds of users entitled to benefiting from the exception, rather than circumscribing the kinds of usage. But having a facilitative provision is only the first step and the urgent need of the hour are massive digitisation projects in libraries, to ensure that people with visual disabilities are finally on an equal footing, at least in terms of access. We learn from the history of the visual disability exception the important distinction between an exception and a mandate. The Marrakesh treaty went beyond merely arguing for the need for exceptions and instead it mandated that national copyright legislations take into account the needs of visually disabled persons.

The exceptions work together towards a common purpose. We showed that a proper construction of the library and educational exceptions requires us to read them harmoniously. The eduction exception, as demonstrated by the two Delhi University photocopy cases, is appropriately wide enough to cover a wide range of educational uses. The interpretative approach adopted by the Delhi High Court relied on a strong version of a purposive theory of exceptions and limitations in copyright law. Thus, rather than merely looking at questions of quantity, the role of intermediaries, or the space of a classroom, the High Court judgement focused on the purpose of photocopying of materials and whether it was primarily for educational purposes.

If students, teachers and researchers represent the demand side of books and learning materials, libraries and librarians represent the supply-side. Through a discussion of the doctrine of exhaustion, we demonstrated that copyright law does not merely tolerate, but in fact actively promotes the legal lending of books and materials which are in the possession of institutions such as libraries. Similar to the education exception, a purposive interpretation of the library exception requires a principle of equivalence to books and their digital counterparts.

This approach is common in the law. There are numerous equivalent examples where legal regulation and interpretation has been expanded to include new technological formats. For instance the advent of video technology raised the legal question of whether video could be considered an equivalent of cinematograph films despite the fact that the latter existed in a

different technological format. In these cases the courts went into the substance of what the regulation of cinema sought to achieve and eventually included video films within the definition of cinematograph films.

Following the principle of equivalence, we show that copyright exceptions that allow for the lending of books ought to be similarly interpreted, and as long as there are measures in place to ensure that electronic versions of books are being treated in a similar fashion to the physical copies, there is no justification for limiting what a library can do with its digital editions. As long as the library controls the process carefully and deliberately, controlled lending in the digital age is simply an extension of the adaptions of the past, from parchments and scrolls to printing presses and copy machines. Libraries, like all institutions must adapt their practices to meet the times.

One of the most enabling innovations in library practice that has emerged is controlled lending of digital images, which brings together two different dimensions of statutory exceptions. Using the preservation exception, libraries may digitise a physical copy of books that they possess for the purposes of storage. Additionally, if they implement a technological system that ensures that the digital copy is treated on par with a physical copy (for instance only one copy can be borrowed at a time, and upon the expiration of the lending period, the copy is no longer usable on a reader's device), then the lending exception kicks in, and libraries would be justified in implementing digital lending of books in this form. Finally, the paper brings the personal use and research exception into conversation with the educational and library exceptions. Constitutional commitments, in the form of the right to read and research, can only be realised through intelligent and empathetic copyright laws and policies.

This led us to a detailed exploration of the library exception of the educational exception in the Copyright Act in India. A proper construction of the library and educational exception requires us to read them harmoniously. The eduction exception, as we demonstrated through a discussion of the two Delhi University photocopy cases, is appropriately wide enough to cover a wide range of educational uses. The interpretative approach adopted by the Delhi High Court relied on a strong version of a purposive theory of exceptions and limitations in copyright law. Thus, rather than merely looking at questions of quantity, the role of

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Of late, the term “controlled digital lending” has been used to describe the practices of libraries. However, we must understand that from the times of antiquities libraries have always practiced controlled lending. That is the very essence of the function of a library, qualifying patrons for access, providing books on a reserve in the library or for circulation, providing copying facilities for researchers and providing guidance on what may be copied. Controlled “digital” lending merely recognizes that in our modern world, the function of libraries has evolved. The practice in question is not new. It is an adaptation to changes in technology, no different from the adaption to previous changes such as the from parchment scrolls to the codex, from block printing to the printing press to the copy machine, and then on to microfilm and the computer. Things change, the practice must evolve. To reiterate our argument, it is more appropriate in the Indian context to speak of controlled educational lending, controlled research lending and controlled equitable lending.

8.1. Ten Facets of Controlled Lending by Public Libraries

In this paper we have surveyed a number of library functions that are permitted (indeed encouraged) under the law once the library has purchased a copy of a book. We attempt to summarize these best current practices in ten facets, corollaries to the five laws of libraries:

1. *Archiving.* All libraries may (and indeed, should) scan their printed books and preserve them properly as part of their archival function. All too many libraries have been destroyed through neglect and violence, and a prime function of a librarian is preservation of the collection.

2. *Visually Impaired Lending.* Under a widely adopted international treaty, any book may be scanned and made available to the print disabled.

3. *Research.* The research exception to copyright permits (indeed encourages) libraries to make materials available to researchers, defined broadly. In a university setting, this is particularly prevalent for faculty and students conducting their research. In our modern era, research use encompasses text and data mining, the use of computer programs to analyze large numbers of texts.

4. *Interlibrary Loan.* A well-evolved system of Interlibrary Loan (ILL) allows libraries to make copies of materials in their own collections to researchers and students who are patrons of other libraries.

5. *Cataloguing.* From Google Books, the HathiTrust, and hundreds of other search engines that have evolved on our modern Internet, we have learned that scans of books and subsequent processing such as optical character recognition and machine learning makes this our modern card catalog. Even if you can't consume the book, providing a general index to locate the book is clearly transformative and non-consumptive. It is one of the great advances in library science.

6. *Educational Use: Course Packs.* Under the education and teaching exception to copyright, libraries may make course packs and other materials available to students in the course of their instruction. The scope of the teaching exception is

clearly broader than simply assembling course packs, but that use has been definitively affirmed in the courts.

7. *Controlled Educational Lending.* For several decades, but with a dramatic increase in usage with the onset of the COVID pandemic, libraries have pulled books from circulation as "closed reserves" and make those book available to faculty (and sometimes students) in digital form. This technique can be used to make library items available to their patrons. In the case of a law school, this includes not just faculty but the student body and others affiliated with the institution. We believe that if a user is on campus and is formally affiliated with the university and is able to demonstrate that by being an authenticated user on the campus network, this falls clearly under the definition of "in the course of instruction."

8. *Controlled Lending for Life-Long Learning.* Most public libraries are open to a number of researchers and others from outside the institution. Lending a user a digital copy of a book that is not circulating is an example of "controlled digital lending," in which the "own-to-loan" ratio is observed, substituting a physical copy of a book on the shelf with a digital scan of that book. The rights of education, research, and personal use are broadly founded in the Constitution of India and thus support broader access to educational resources throughout India.

9. *Consortium-based Systems.* Libraries have a special place in the copyright act, the enabling library acts, and under the constitution of India, particularly university libraries. University libraries, such as law schools, may band together in consortia and make the sum total of physical copies of a particular book available to authenticated users in their institutions while observing the own-to-loan ratio. This practice is common in countries such as the United States, where consortia the Boston Public Library Consortium work together to share resources. As such, a National Law Library of India, serving all law schools of India under a distributed, consortium-based form of library system is not only desirable, but doable.

10. *Federated and Distributed Infrastructure.* The banding of physical public libraries into consortia could go so far as creating a distributed national Public Library of India to serve all the people of India using the principles of controlled lending on a digital basis. This kind of national infrastructure can be built bottom-up in a distributed fashion, and can be the kind of essential facility that would bring new life to the hopes and aspirations embedded in the preamble and the fundamental rights, indeed the entire fabric, of the Constitution of India

In the context of a country marked by sharp inequalities, it is absolutely imperative that public institutions make the best use of their limited resources to facilitate the widest access possible and to reach those who are downtrodden and marginalised in the most efficient and equitable manner. If we are to successfully achieve these goals, we will require many big steps and measures to be taken by the government and public institutions, but in the meantime there is much we can do to start.

Universal access to knowledge is the great promise of our time. The journey of a thousand miles begins with one step. Let us walk down that road together. Jai Gyan.